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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER ZENITH RADIO CORPORATION.

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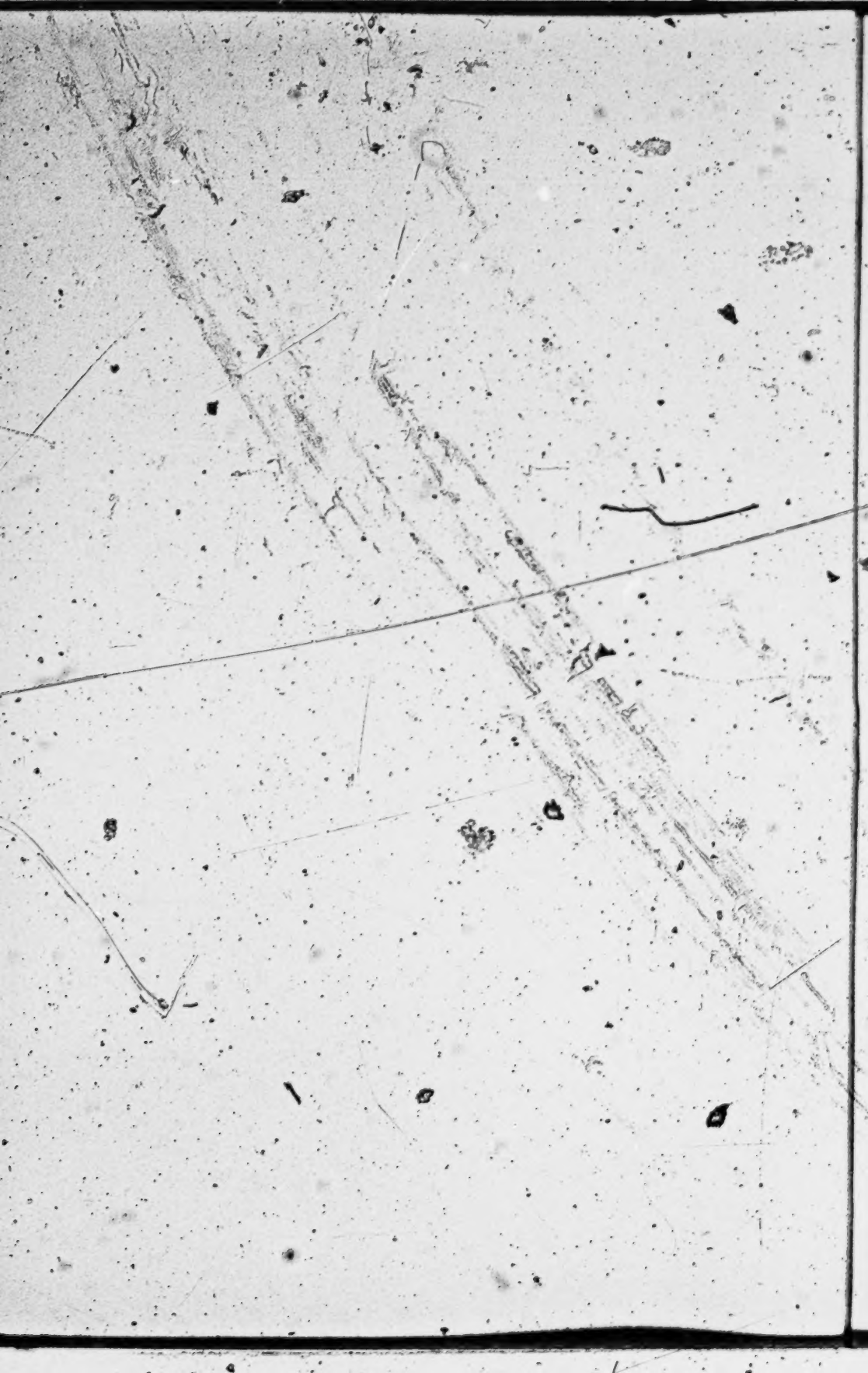

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CITATIONS TO OPINIONS BELOW.

The District Court rendered no formal opinion but entered findings of fact and conclusions of law on the antitrust and misuse issues (A. 2859, 2892-2912) which are reported at 239 F. Supp. 51, 69. A copy thereof fully annotated to the record is printed in Appendix A to this brief.

The opinion of the Court of Appeals (A. 4238-63) is reported at 388 F. 2d 25.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 13, 1967 (A. 4236) but its opinion was not entered until December 19, 1967 (A. 4238). Petitioner filed a timely petition for rehearing which was denied on January 23, 1968 (A. 4264, 4265, 4279). The petition for writ of certiorari was filed on March 26, 1968, and was granted on May 27, 1968. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The statutory and rule provisions involved are:

Section 1 of the Sherman Act, 15 U. S. C. Section 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . ."

Section 2 of the Sherman Act, 15 U. S. C. Section 2, providing in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

Section 4 of the Clayton Act, 15 U. S. C. Section 15, providing:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without

respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Seciton 16 of the Clayton Act, 15 U. S. C. Section 26, providing in pertinent part:

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, ..."

Rule 52(a) of the Federal Rules of Civil Procedure, providing in pertinent part:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . ."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the federal antitrust laws protect American foreign trade from injury by foreign patent pools joined in by respondents and other American companies where such pools in order to suppress the competition of American manufactured radio and television sets refuse to grant a license under pool patents to import into the pool markets?

2. Whether petitioner was injured in its business within the meaning of Section 4 of the Clayton Act where substantial and uncontested evidence shows that petitioner's exports of radio and television sets were prevented or substantially curtailed in Canada, England and Australia because the pools would not grant a license to import and threatened importers, vendors, purchasers, and users of unlicensed sets with patent infringement suit?

3. Whether patent pools controlled by petitioner's competitors and joined in by the respondents constitute a threat of injury to petitioner's export business within the meaning of Section 16 of the Clayton Act where the Pool members agree not to license imports and to sue and threaten with suit dealers and users of unlicensed sets?

4. Whether under Section 4 of the Clayton Act petitioner was required to make a formal demand upon the patent pools during the damage period for a license to import as a condition precedent to showing injury to its business where the evidence showed and the District Court found that the pools would not grant such a license and such a demand was futile?

5. Whether the uncontradicted testimony of Zenith's officers based on personal knowledge of business conditions and concerning the volume of business which Zenith would have done in Canada, England, and Australia absent the illegal patent pools constitutes substantial evidence within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure in support of the District Court's damage findings?

6. Whether the Court of Appeals by failing to accept the reasonable inferences and conclusions of the trial court drawn from undenied testimony and documents, and its refusal to view the record evidence in the light most favorable to petitioner, usurped the function of the Trial Court as the trier of the facts contrary to Rule 52(a) of the Federal Rules of Civil Procedure?

7. Whether a reviewing court can utilize rejected post-trial offers of proof, which petitioner had no opportunity to meet, in weighing the probative value of undenied testimony and exhibits in the record, and as a basis for a holding that the trial court's damage findings were "clearly erroneous."

8. Whether a patentee misuses its patent monopoly where under threat of patent infringement suits brought pursuant to a conspiracy with foreign competitors of the prospective licensee, it seeks to force the prospective licensee to accept a territorial license limited to the United States which prevents the sale of patented apparatus abroad and requires the licensee to concede the validity of the inventions contained in the counterparts of such patents held and administered in foreign patent pools?

9. Whether a patentee misuses and unlawfully extends its patent monopoly where, under threat of patent infringement suits, it requires a prospective licensee either to accept unwanted patents under a package license covering 500 patents or to pay royalties under a formula whereby any one patent in the package will be licensed at 50%, any two at 80%, and any three or more at 100% of the package rate irrespective of the quality of any particular patent?

10. Whether under *Automatic R. Mfg. Co.* v. *Hazeltine Research*, 339 U. S. 827 (1950) a patentee may compel a prospective licensee under threat of patent infringement suits to accept a license requiring payment of royalties based on the licensee's entire production of unpatented as well as patented apparatus, thereby destroying the incentive of the licensee to invent around the licensed patents?

11. Whether the Court of Appeals has the right to dismiss the cause as against Hazeltine Corporation by holding null and void a formal written pre-trial stipulation by the respondent Hazeltine Research, Inc. that for the purpose of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity to avoid the necessity of proving the two corporations were one and the same, which stipulation was relied upon by the District Court and all counsel throughout the trial?

STATEMENT OF THE CASE.

This suit was started by Hazeltine Research, Inc., a wholly owned subsidiary of Hazeltine Corporation, for alleged infringement of a patent adjudicated to be invalid by both the District Court and the Court of Appeals in this case (A. 11). It was stipulated by the parties that the parent and the subsidiary corporations would be considered one and the same company for the purposes of this litigation (A. 55). The petitioner, Zenith Radio Corporation, counterclaimed for treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act (A. 64), and recovered two judgments against respondents Hazeltine Research, Inc. and Hazeltine Corporation.

The first judgment was entered on April 5, 1965 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (A. 3078), and awarded petitioner treble damages in the amount of $19,042,173 for loss of sales and profits in Canada by reason of the activity of the Canadian patent pool known as Canadian Radio Patents, Ltd.[1] It also enjoined respondents from adhering to any patent pool agreements which restricted Zenith from exporting electronic apparatus into any foreign market.

The second judgment was entered on December 13, 1965 (A. 3539) and awarded petitioner treble damages in the amount of $15,919,458 for loss of sales and profits in England and Australia by virtue of the activities of the patent pools in these countries in which respondents had joined and placed their radio and television patents.

---

1. This amount included treble damages of $150,000 for expenses incurred in defending against Hazeltine's patent infringement suit.

In entering the last judgment the Trial Court made the following comment (A. 3524):

> "There could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools which I have found, and reiterate, existed at the time of the damage period."

The Court of Appeals reversed both judgments on the ground that there was no proof in the record that either the Canadian, or English, or Australian pools caused any damage or threatened any damage to Zenith's radio and television business in those respective foreign countries (A. 4238, 4254).

A. Proof of Injury to Petitioner's Business in Canada.

The proof of injury to petitioner's business in Canada occasioned by the Canadian patent pool was in large part documentary and not denied by any witness.

Petitioner could not export its radio and television sets to Canada and sell them there without a license under the pool patents without exposing its products to confiscation and its distributors and dealers and customers to patent infringement suits (Def. Ex. 139; A. 1883, 1890; Def. Ex. 140; A. 1959, 1961; Def. Ex. 141; A. 1962, 1963; Def. Ex. 142; A. 1964, 1968; Def. Ex. 143; A. 1968, 1970-72; Def. Ex. 144; A. 1973-77).[2] The pool refused to grant a license to import. The only available license under the pool patents was for local manufacture (Pl. Ex. 50A; A. 2811, 2829-30; Def. Ex. 150; A. 2013; A. 453-4; 392, 410).

The patent pool in Canada has been before the federal courts in various antitrust proceedings on many occasions

2. Unless otherwise indicated the exhibits cited in this brief were received in evidence pursuant to a pre-trial stipulation of the parties with reference to documentary evidence (A. 55, 72).

and has been the subject of five consent decrees in government civil suits. See *United States* v. *General Electric Company, Westinghouse Electric Corporation and N. V. Philips-Gloeilampenfabrieken*, 1962 *Trade Cases* ¶¶ 70,546, 70,428, and 70,342 (S. D. N. Y., 1962); *United States* v. *Radio Corporation of America*, 1932-1939 Trade Cases ¶ 55,015 (D. C. Del., 1932); *United States* v. *Radio Corporation of America*, 1958 Trade Cases ¶ 69,164 (S. D. N. Y., 1958).

The same conspiracy was the subject matter of a private treble damage action in the District Court in Chicago in the form of a counterclaim filed by petitioner in a patent infringement suit similar to this action. *RCA* v. *Rauland Corporation and Zenith Radio Corporation*, United States District Court for the Northern District of Illinois, Eastern Division, Civil Action No. 48 C 1818 (Pl. Ex. 39; A. 2701; Pl. Ex. 40; A. 2726). During the course of that proceeding seven judicial opinions against the conspirators were handed down. One of them came here by petition for certiorari, denied by this Court (18 F.R.D. 440; 1956 *Trade Cases* ¶¶ 68,306, 68,475, 68,490; 1957 *Trade Cases* ¶¶ 68,712, 68,744, aff'd. 217 F. 2d 218, cert. den. 348 U. S. 968).[3]

The pool, which was the subject of this suit and prior litigation, is called Canadian Radio Patents, Ltd. It was formed some forty years ago by General Electric Company through its subsidiary Canadian General Electric Company, and by Westinghouse through its subsidiary, Canadian Westinghouse. The shareholders of Canadian Radio Patents, Ltd. are Canadian General Electric, Canadian Westinghouse, Canadian Radio Manufacturing Corp. Ltd. (a Canadian subsidiary of Phillips of Holland), Canadian

3. Proof of the above Zenith and Government proceedings was put into evidence in this case by counsel for respondents (Pl. Ex. 36-48, A. 2667-2786).

Marconi, and Northern Electric Company (an affiliate of American Telephone & Telegraph Company and Western Electric Company). (Pl. Ex. 50-A; A. 2811, 2829; Def. Ex. 117; A. 1637; Def. Ex. 142; A. 1964).

Respondents joined the Canadian conspiracy in 1943 by entering into a license agreement with the Pool which granted to Canadian Radio Patents Limited the exclusive right to license Hazeltine patents in Canada (Def. Ex. 118; A. 1645). Under this arrangement an exclusive license with the right to include all the Hazeltine patents present and future in its licensing and litigation activities was granted to the Pool in return for a substantial share of the Pool's income from all sources (Def. Ex. 118; A. 1645, 1649, 1650-1, 1657; Def. Ex. 127; A. 1839; Def. Ex. 128; A. 1841-43; Def. Ex. 142; A. 1964-5). The pooling agreement was extended beyond the date of the filing of Zenith's counterclaim in the instant suit (Def. Ex. 119; A. 1672).

The entry of Hazeltine into the Canadian cartel by placing its Canadian patents in the Pool was by agreement made in New York City twenty-five years ago by Jack Binns, Hazeltine's president and by L. B. Dodds, Hazeltine's attorney and vice president and by Messrs. Lanoue and Fotheringham of Northern Electric Company and J. C. Macfarlane of Canadian G. E. on behalf of the Pool (Def. Ex. 128, A. 1841).

The Pool is made up of Canadian subsidiaries of American manufacturers who have pooled their electronics patents and has been and is now run by the Canadian subsidiary of the General Electric Company (Pl. Ex. 50-A; A. 2811, 2829; A. 454-5). Hazeltine Corporation's foreign patents, being the counterparts of their United States patents in the radio and television field (A. 131, 145), are included not only in the Canadian patent pool (Def. Ex. 128; A. 1841) but in the English pool (Def. Ex. 50; A.

1190; Def. Ex. 81; A. 1461) and Australian pool as well (Def. Ex. 116; A. 1636; Def. Ex. 184; A. 2357).

It was admitted by correspondence that Hazeltine knew its patents were in a Pool which would not license the import of radio or television sets into Canada. In a letter to his European agent, Dodds, the Hazeltine vice president in charge of patents, who incidentally tried the present case in the trial court, explained the effect of the restrictive agreements as follows (Def. Ex. 115; A. 1634):

> "We have always told our licensees in the United States that, while we could guarantee them no protection on their exports to foreign countries, as a matter of policy we would not collect a second royalty on sets exported to foreign countries where Hazeltine had complete control of its patent situation. *In those countries where the Hazeltine patents are included in an industry-wide pool they are, of course, beyond our control and our licensees have to make their own arrangements with such pool.*" (Italics ours)

Prior to the trial of this case Zenith counsel took the deposition of L. B. Dodds which was read into evidence at the trial as follows (A. 178-9):

> "Q. When did you find it out, whether you recall the date or not, did you look into it to find out whether or not you might be liable for being in the pool?
>
> "A. I am not quite sure how to answer it. I have been aware, of course, for a great many years, of this attack upon American companies who directly or indirectly participated in Canadian Radio Patents Limited. I have tried to keep myself informed both of any litigation involving that subject matter, or any proceedings in this country or abroad, and when I acquired any particular bit of information I just do not recall. That's a long period of time.
>
> "Q. You knew something was going on in the way of an attack by American companies against that pool, didn't you?
>
> "A. Yes.

"Q. You had known that for a long time?
"A. Yes.
"Q. You still stayed in the Pool?
"A. Most definitely, and we intend to continue to stay in the pool."

Zenith could not export its sets from the United States to Canada under any license issued by the Pool (Pl. 50-A; A. 2811, 2829-30). It was advised many times by the Pool that in order to obtain a license it had to build a factory in Canada and manufacture there (A. 454; 392, 410; Def. Ex. 150; A. 2013). Imports were prohibited under the standard license form used by the Pool and the license protected only local manufacture (Def. Ex. 122, Article II, Section 1; 1691, 1693; Def. Ex. 123, Article II, Section 1; A. 1721, 1725). The record is replete with efforts on the part of Zenith to obtain a license from the Pool that would cover imports into Canada (A. 453-4; 392, 410). These attempts were in each instance futile (Def. Ex's. 146-154; A. 1982-2021).

A succinct description of the Canadian Pool, its policies, and its effect on the business of companies such as Zenith was written by a Canadian Royal Commission. The report, dated December 31, 1959, describes the Pool at a time within the instant damage period and was read into evidence by a Hazeltine witness by the name of Gordon Fripp Henderson (A. 667, 677-83), a Canadian lawyer called by Hazeltine as an expert on Canadian patent law. It reads as follows (Pl. Ex. 50A; A. 2811, 2829-30):

> "Canadian Radio Patents Limited (hereinafter called CRPL) was incorporated in 1926 for the purpose of acting as a patent licensing agency. At the time of the presentation of its brief to this Commission it acted as the central patent licensing agency in the administration of patent rights in the radio, television and general electronics fields in respect of patents owned by its then five shareholders:

Canadian General Electric Company, Canadian Westinghouse Company, Northern Electric Company, Canadian Marconi Company, and Canadian Radio Manufacturing Company.

It also acted as licensing agent in Canada for RCA Victor Company *and Hazeltine Electronics Corporation.* . . .

. . . . . .

"The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.

"CRPL indicated that it does not grant a license to any importer of radio or television receivers, except in the limited situation where the type or kind of radio or television receiver sought to be imported *is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.*

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . .". (Italics ours)

The Canadian Pool by means of patent agents and investigators as well as by Canadian manufacturers and distributors' trade associations constantly policed the Canadian market in order to stop the sale in Canada of imported sets (Def. Ex. 144; A. 1973-77; Def. Ex. 140; A. 1959-61; Def. Ex. 141; A. 1962-3; Def. Ex. 143; A. 1968-72). Warning notices were widely published in newspapers and trade publications throughout Canada (Def. Ex's. 130-138; A. 1861-1880). These notices stated, "Newspapers from Coast-to-Coast Carry the Tremendous Total of 4,343,084 advertising

messages to help put a stop to importation of cheap, sub-standard, imported radios" (A. 1863).

The warning notice read as follows (Def. Ex. 134; A. 1869):

"NOTICE.

"To Importers, Vendors or Users of
Radio and Television Receivers

"We wish to bring to your attention that Canadian Radio Patents Limited is a central patent licensing agency administering various important Canadian patents of invention relating to radio and television receivers.

"While under the provisions of Section 46 of the Canadian Patent Act, the owner of a patent and his legal representatives have the 'exclusive right, privilege and liberty of making, constructing, using and vending to others to be used' the patented invention, Canadian Radio Patents Limited, however, in accordance with the requirements of Sections 67 and 68 of the Patent Act, has licensed the following Canadian companies for the manufacture and sale in Canada of radio and television receivers embodying said inventions:—

"Addison Industries Limited, Booth Industries, Canadian Admiral Corporation Limited, Canadian Aviation Electronics Limited (DuMont), Canadian General Electric Company Limited, Canadian Marconi Company, Canadian Radio Manufacturing Corporation Limited, Canadian Westinghouse Company Limited, Chisholm Industries Limited, Cossor (Canada) Limited, Crosley Radio and Television Division, Moffats Ltd., Crystal Radio of Canada Ltd., Dominion Electrohome Industries Limited, Electrical Products Manufacturing Company Limited, Emerald Radio of Canada Ltd., Hackbusch Electronics Limited, Hallicrafters (Canada) Limited, Lifco Radio & Record Players, Lynox Electronics Reg'd, McKinnon Industries Limited, Measurement Engineering Limited, Philco Corporation of Canada Limited, Philips Indus-

tries Limited, Pye Canada Limited, Racine Mfg. Co. Ltd., R. C. A. Victor Company Limited, Radio Communications Equipment & Engineering Ltd., Research Industries Limited, Rogers Majestic Radio Corporation Limited, Shelbern Industries (Canada) Ltd., Sparton of Canada Limited, Stark Electronic Instruments Limited, Stewart-Warner Corporation of Canada Limited, Sylvania Electric (Canada) Ltd.

"The above companies are working the patented inventions in Canada on a commercial scale and are prepared and willing to meet the public demand for the patented articles in Canada on reasonable terms.

"*Canadian Radio Patents desires to inform importers, vendors, purchasers or users of radio or television receivers which infringe patent rights owned or administered by Canadian Radio Patents Limited and are not manufactured by any of the Canadian companies listed above, that they will be held liable to Canadian Radio Patents Limited on account of said infringement.* • • •

CANADIAN RADIO PATENTS LIMITED
200 St. Clair Avenue West, Toronto 7, Canada"
(Italics ours)

The extent and viciousness and effectiveness of the Pool in stopping trade and commerce by Zenith into Canada is shown by defendant's Exhibit 130, which was an advertising circular shown by documentary evidence to be run repeatedly and "periodically" (Def. Ex. 144; A. 1973-4) in many papers by Canadian Radio Patents Limited, and advising prospective customers of radio and television sets of the following (A. 1861-2):

"CANADIAN RADIO
PATENTS, LIMITED
Sponsors Nation-Wide
Advertising-Publicity Campaign . . .

"TO SELL 'Canadian-Made' RADIOS FOR YOU!

"WARNING!

"Be sure your radio is Canadian-Made . . . is Safe to Operate . . . Complies with the Canadian Electrical Code . . . is Licensed under Canadian Patents.

"Use of an imported radio may make you liable for damages for infringement of Canadian patents . . . may endanger your life and property through fire and shock hazards . . . may be illegal under Provincial Electrical requirements.

"Fire and Shock Hazard.

"Only Canadian-made radios safeguard you from fire and shock hazards.

"Because cheap imported radios do *not* embody ordinary safeguards required by law in Canada, they constitute very definite fire and shock hazards. Working parts are connected directly to the main power supply, thus, touching working parts may result in a bad shock, even death. Lack of safeguards, too, causes these radios to heat up, sometimes to start fires.

• • • • •

"Infringement of Canadian Patent Rights.

"*Only Canadian-made, Canadian-sold sets are licensed under the basic patents of Canadian Radio Patents, Limited.*

"Use of radios manufactured and purchased outside the Dominion of Canada may constitute an infringement of Canadian patent rights. Infringement of patent rights, naturally, makes the owner liable to legal action.

"Unsatisfactory in Operation.

"Only Canadian-made radios can be relied upon to operate efficiently in Canada. . .

"No Trade-In Value.

"Only Canadian-made radios have an equitable trade-in value.

"Because Canadian dealers are not permitted by law to sell substandard radios, as are most of the imported models, Canadian radio dealers cannot afford to give trade-in allowances on imported models.

"No Servicing . . . No effective Guarantee.

"Only Canadian-made sets are sold in this store . . . which is always ready to carry out the manufacturer's guarantee . . ." (Italics ours)

Obviously the Canadian Pool was organized to stop the export of television and radio sets from the United States into Canada and stop the competition of American companies such as Zenith with the shareholders of the Pool whose American parent companies were also competitors of Zenith in the United States (A. 457). The record shows that these conspirators were successful in their illegal endeavor (See Def. Ex. 139; A. 1883, 1887; Def. Exs. 140-144; A. 1959-77).

Neither Hazeltine nor the Pool ever offered any proof that the activities of the Pool ever ceased. Actually it was admitted that they continued beyond the date of the trial when Mr. Kayser, one of counsel for respondents, told the Court (A. 3036):

"Now, what Mr. McConnell is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents—that characterized necessarily as he characterizes them, but that

these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

As recently as May, 1962, a time well within the instant damage period, the evidence shows the Pool in full operation. At that time Motorola's Canadian distributor, Electrical Distributors, Ltd., was threatened by CRPL as follows (Def. Ex. 162D; A. 2054, 2056):

". . . should importation of Motorola products take place and should these be found to incorporate inventions covered by patents which we are empowered to license other than those of Canadian Westinghouse or CGE, we would be forced to place the matter in the hands of our solicitors . . ."[4]

The success of such a method in stopping competition was made a matter of record in a report to the board of directors of Canadian Radio Patents, Ltd., dated January 13, 1954 (Def. Ex. 144; A. 1973-77), in which the Pool manager said:

"Attached is a summary of the actions that were taken by CRPL in the thirty-five cases of infringement that were reported during 1953.

"Most of the infringement reports received in 1953 involved individual dealers that had imported U. S. television receivers and, following the approved procedure in such cases, we usually settled for a written guarantee to immediately discontinue the infringement and did not press for damages if only a few sets were involved.

"In cases such as Electromaid where 72 TV receivers were involved and in the case of the 160 Arvin sets imported by S. G. Waters after previous warnings we settled for $10 per receiver damages.

"After initial warning letters were ignored, we purchased and examined for infringement a total of

4. This notice was turned over to a former Zenith distributor by the name of MacCuspie, who in turn sent it to Joseph Wright, Zenith's president, in Chicago (Def. Ex. 162D; A. 2053).

six TV receivers (from Faucher, North Star, Legare, Century, Amhearst and Appliances Unlimited).

"The threat of possible infringement action resulted in satisfactory settlements in the cases of North Star, Legare and Century (see notes on attached summary) but it was necessary to commence an action in the Exchequer Court of Canada before a settlement was made with Faucher. Mr. Gowling is now proceeding against Amhearst Television and the receiver recently purchased from Appliances Unlimited is being examined as a preliminary to commencing an action against this company.

"Although we have not received any new reports of infringement for the past two months and believe the situation is under control, *we are continuing to periodically run the warning Notice in the trade publications.*" (Italics ours)

With respect to the dealer, Faucher, referred to, the General Counsel of Canadian General Electric wrote (Def. Ex. 142; A. 1964, 1967-8):

". . . [T]he operations of C.R.P.L. are of very substantial benefit to the industry as a whole and to all the shareholders, *if for no other reason than the threat against dumping.*

Recently a writ was issued against Faucher Electric of Montreal for selling imported Dumont sets. The Plaintiffs were C.G.E., C.R.P.L. *and Hazeltine.* An offer of settlement has been made and it is not expected that this case will go to court." (Italics ours)

The actions of the Pool in curbing imports from the United States into Canada were reported from time to time to Canadian radio and television distributors as follows (Def. Ex. 141; A. 1962-3):

"Minutes of the regular monthly Meeting of the Quebec Radio-Television Distributors Association, Inc., held on Thursday, May 7th, 1953, at 12:30 P. M. in the Queen's Hotel, Montreal, Que.

• • • • •

"Importation

"The Chairman reported on action taken by Canadian Radio Patents Ltd. to halt the importation of non-licensed radio and television sets and complimented Mr. Brownlee [former president of C. R. P. L.] for the excellent work which he was doing. It was decided that members should clear all infractions through the Secretary who would report immediately to Mr. Brownlee. The Secretary was requested to write C. R. P. L. requesting information governing importation regulations as well as details as to what was necessary to qualify for a manufacturing license."

No witness was called by Hazeltine to testify that such practices were ever stopped by the Pool.

The annual revenue of the Pool was approximately one million dollars (Def. Ex. 142; A. 1964-5).

Defendant's Exhibit 144 (A. 1973), which was produced from the CRPL files, notes the fate of a distributor of unlicensed sets as follows (A. 1977):

"3. Faucher Electric—Disregarded warnings—purchased receiver as evidence—examined for infringement—Gowling started action in Exchequer Court of Canada on October 15, 1953—*Faucher consented to judgment prohibited from future importing* and paid $10.00 per receiver damages." (Italics ours)

It is interesting to note that the Gowling referred to is the law partner of Mr. Gordon Fripp Henderson, whom Mr. Dodds put on the stand in this case as an impartial expert on Canadian patent law. (A. 688-9; Def. Ex. 161; A. 2034).

For many years every time Zenith appointed a distributor to sell Zenith products the distributor was warned by the Pool to stop importing and to return the merchandise or face crippling litigation both against such distributor and his customers (A. 450), which litigation would be brought by the Pool upon hundreds of Pool patents (Def.

Ex.'s 155-162D; A. 2022-2065). The Pool held 5000 patents (Pl. Ex. 50A; A. 2811, 2830) and to defend litigation on them would obviously exhaust and ruin even a company as strong as Zenith, even if as here the patents were held invalid. The record shows that just defending against the patent in suit on the patent issue alone has cost Zenith $50,065.72 (A. 554).

In 1957 Zenith settled its antitrust suit against RCA, General Electric and Western Electric (*supra*, p. 8). Zenith received cash of 10 million plus licenses under the defendants' Canadian television patents, but for black and white only (Pl. Ex. 48; A. 2783-86).

Zenith mistakenly thought that by its settlement with the three leading members of the Pool its troubles with the Pool had ended and it started to export radio and television receivers to Canada, through its Canadian subsidiary, Zenith Radio Corporation of Canada (A. 450, 456). As soon as the Canadian subsidiary started to set up distribution, Mr. Brian McConnell, manager of the Pool, called on the Zenith Canadian subsidiary in Toronto, on July 30, 1958, and demanded that Mr. Lloyd Kiely, general manager, inform him of Zenith's plans in Canada. Specifically, McConnell informed Kiely that even though patent licenses covering imports had been obtained by Zenith from RCA, General Electric and Western Electric as a result of the RCA-Zenith litigation, the Pool had many other patents and no licenses permitting import would be granted by the Pool. McConnell requested a circuit diagram of the Zenith receivers which were being imported, which he said would be turned over for examination by "CRPL principals" and in the event any infringement was found a further meeting "to discuss the problem" would be arranged (Def. Ex's. 151-152; A. 2014-18).

In September of 1958 it came to Zenith's attention that a warning notice (Def. Ex. 138; A. 1880) to importers

substantially the same as set out above (*supra* pp. 13-14) was again appearing in the *Trade Builder*, a Canadian trade publication. Mr. Joseph Wright, president of Zenith, wired to McConnell demanding that this attack on Zenith's products in Canada cease (Def. Ex. 138; A. 1879-80).

Wright's wire had no effect. On September 16, 1958, McConnell wrote Wright referring to his earlier discussion with Kiely in which he said no license to import would be granted by the Pool. McConnell again asserted that Zenith was "using inventions covered by patents which we administer and under which we are informed you are not licensed". (Def. Ex. 138; A. 1881.)

On September 23, 1958, Wright wrote McConnell in reply stating (Def. Ex. 138; A. 1882): "You . . . must be well aware that the activities of Canadian Radio Patents Limited in stopping our Canadian business in past years was at the very heart of the substantial claim for damages which was settled at the same time the licenses were granted."

Wright's September 23, 1958 letter was not even answered (A. 449).

Thereafter in a conference with Zenith's vice president Frank Crotty, on May 12, 1959 (Def. Ex. 154; A. 2021) McConnell told Crotty that Zenith was infringing some of the Pool patents "one of which was a patent of Hazeltine origin. He told me that I would have to take a license; that the license could not be for importation, it would have to be for local manufacture" (A. 410). This conversation was not denied.

Following the May, 1959 meeting McConnell wrote Crotty on June 5, 1959 enclosing the Pool's standard license forbidding importation and gave notice of infringement of a CRPL patent (Def. Ex. 154; A. 2021). McConnell advised:

"With regard to the patent and its use in Zenith television receiver No. B-2225, I have had this matter reinvestigated and there is no doubt in our minds that the invention covered by the patent is used in this receiver. The tests show this quite conclusively."

Following the McConnell meeting and the Pool's notice of infringement the instant infringement suit was filed by Hazeltine in November, 1959 (A. 1, 11). The suit was brought on one Hazeltine monochrome patent, the counterpart of which was included in the Canadian Pool (A. 131; 272). At the same time Hazeltine asserted that Zenith was infringing at least four black and white patents (A. 485-6). Subsequently on October 18, 1961 Hazeltine also asserted nine color television patents against Zenith (A. 419; Def. Ex. 10; A. 1010). The counterparts of these patents were also in the Canadian Pool (A. 131, 145-6; Def. Ex. 118; A. 1645, 1648). The connection between the Pool's notice of infringement and the filing of the instant infringement suit by Hazeltine was explained by Hazeltine's attorney Dodds in his opening statement as follows (A. 131-2):

"... These pools don't have any power to keep out anything. They are not a government body. All it means is that if you import goods into Great Britain or Canada or Australia, and if what you are importing are infringements of the patents they administer, you may subject yourself to an infringement suit, the same as if you infringed a patent in this country. *And we can't prevent Zenith from selling sets without an adjudication, which we are in the process of trying to get now.*" (Italics ours)

Zenith necessarily had to curtail its operations in Canada pending the outcome of the infringement suit. If it lost the patent suit it would be placed in an impossible legal position in any subsequent infringement suit by the Pool in Canada. It could no longer contend, as Wright had in his letter to the Pool (Def. Ex. 138; A. 1882), that the patent

was invalid or was not infringed, because of the estoppel effect given patent judgments by the Canadian Courts (See *infra*, p. 72). Moreover, the defense of misuse is not recognized by the Canadian Courts.

At the same time Hazeltine was prosecuting the instant infringement suit it was attempting to coerce Zenith into accepting its standard license, the terms of which expressly excluded an implied license under Hazeltine's foreign counterpart patents. The standard license provided in pertinent part:

> "Sec. 3. Nothing herein contained, and no act or acts hereunder, shall be construed as, or result in, conveying any license to Licensee, expressly or by implication, estoppel or otherwise: . . . (b) Under any patents of countries foreign to the United States; . . ." (Def. Ex. 2; A. 955, 958).

This provision expressly prevented the application of decisions holding that the grant of a domestic license also grants an implied license to the foreign counterpart patents. See *Curtis Aeroplane & M. Corp.* v. *United Aircraft E. Corp.*, 266 Fed. 71, 77-8 (C. A. 2, 1920). It was an essential part of the conspiracy because without it Hazeltine would be in violation of its agreements with its foreign conspirators not to license except through the Pools. This was conceded in a letter written by Dodds, where he stated:

> "In those countries where the Hazeltine patents are included in an industry-wide pool they are, of course, beyond our control and our licensees have to make their own arrangements with such pool." (Def. Ex. 115; A. 1634)

As in the case of a judgment of validity and infringement, if Zenith accepted the standard license it would be defenseless to an infringement suit by the Pool. It could give no acceptable reason to a Canadian court why it was willing to pay for the use of Hazeltine's patents in the

United States, but at the same time refuse to recognize the validity of the exact Canadian counterparts when sued for infringement in Canada.

Thus Zenith was placed in this dilemma. It could not get a license from the Pool to import, and the Hazeltine standard domestic license expressly precluded an implied license under its foreign patents. If Zenith lost the patent suit it would have no defense to a similar suit by the Pool. If it purchased peace by accepting the Hazeltine standard license it was equally defenseless to a suit by the Pool.

Under these circumstances Zenith had to curtail its operations in Canada. Zenith's President Joseph Wright testified *without denial* that the threats and restrictions of the Canadian Pool not only limited Zenith's ability to obtain first class distributors and dealers in Canada (A. 452-3), *but limited the amount of time and money that Zenith could properly devote to developing the Canadian market* (A. 490). Both Wright and Kaplan, Zenith's Treasurer, testified that the Canadian and American markets were comparable and that but for the threats and interference of the Pool, Zenith could have obtained the same share of the Canadian radio and television market (20%) as it enjoyed in the United States (A. 461, 528). *There was no denial to this testimony.*

Zenith's counterclaim was filed May 22, 1963 (A. 2, 62, 64). The damage period involved was from June 1959 through May 1963 (A. 517-19; Def. Ex. 220; A. 2661). The counterclaim alleged that the bringing of the instant infringement suit and the attempt to force Zenith into accepting Hazeltine's standard license were overt acts in furtherance of the foreign conspiracy and that as a result and because of the Pool's refusal to license imports Zenith had been forced to delay development of its foreign trade in the Pool markets (A. 64-9). The Trial Court found these issues in favor of Zenith when it found (A. 2857):

"The court has reviewed the evidence, exhibits and briefs of the parties in both the patent and antitrust phases of the above cause and finds for the defendant on the issues raised by the complaint and answer and the counterclaim".

The Trial Court further found (A. 2903, Finding XXV):

". . . Since 1943 Hazeltine has been an active participant in the activities of the Pool and has been receiving a substantial share of its profits. The Hazeltine patents go into the Pool pursuant to an exclusive license agreement between Hazeltine and Canadian Radio Patents Limited which grants to the Pool the right to include Hazeltine's Canadian Patents, present and future, in its licensing and litigation activities. This arrangement has been extended to a date beyond the filing of the instant counterclaim."

This finding was not in any way disturbed by the Court of Appeals decision.

The only defense attempted in the Trial Court to the cartel proofs in Canada was the contention that the Pool's restriction on licensing imports was justified by provisions in the Canadian Patent law. See Dodds' opening statement (A. 131, 134). A great deal of expert testimony was adduced on this issue (A. 667-725; 807-25).

The Trial Court found (A. 2906); "XXXII. The proofs established as a fact that in the circumstances of this case the Canadian Patents Act does not require the Pool to refuse to license importation, as contended by plaintiff. Nor does the act penalize in any way a patentee who licenses for importation where, as in this case, there is being carried on extensive manufacturing in Canada under its patents."

Respondents abandoned this so-called defense in the Court of Appeals!

B. Proof of Injury to Petitioner's Business in England and Australia.

On April 5, 1965, after entering the first judgment under Rule 54(b) of the Federal Rules of Civil Procedure, the Trial Court reserved jurisdiction of the case for a further hearing on "the amount of damages asserted in the claims for damage accruing by virtue of cartel restrictions in Australia and England during the damage period alleged" (A. 3080).

On December 13, 1965, after further hearing, the Trial Court entered a joint and several judgment in favor of petitioner in the amount of $15,919,458 together with the costs of suit and a reasonable attorney's fee to be fixed by further order of the Court (A. 3539).

This judgment was entered on the amended finding of fact dated November 30, 1965, which recited the following (A. 3537):

> "The Finding of Fact XXXVI heretofore entered herein on February 25, 1965, with respect to the damages sustained by Zenith Radio Corporation during the damage period June 1, 1959 through May 31, 1963 is hereby modified and amended with respect to England and Australia only as follows:
>
> "The Court reconfirms its finding that the foreign commerce of Zenith was restrained and that Zenith was in fact damaged by the patent pools in England and Australia during the damage period but modifies and amends its finding as to the amount of damages in these markets as follows:

England	Television	$4,312,924	
	Radio	745,102	
			$5,058,026
Australia	Television	$ 223,508	
	Radio	24,952	
			$ 248,460
	Total England and Australia		$5,306,486"

The computation of the above damages in accordance with of the trial court's opinion is shown in the record (A. 3534-5).

The further hearing upon which this finding was made was limited to the question of whether there existed governmental embargoes caused by import restrictions starting prior to the damage period which would have prevented Zenith from realizing the amount of lost profits shown on defendant's Exhibit 220 (A. 3037-8).

After hearing several days testimony on this issue, which hearing was held more than a year after the trial of the case, the Trial Court concluded that all governmental restrictions had been removed in England within one week of the start of the damage period and in Australia within ten months of the start of the damage period. The Court made the following ruling (A. 3524-6):

> "The Court: *There could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools which I have found, and reiterate, existed at the time of the damage period.* There was precedent for using the method that was used by the Court for ascertaining the damages as far as Canada was concerned. A further hearing has indicated that the situation in regard to the United Kingdom and Australia was different than it was in regard to Canada; that the pool was not the sole reason that sales could not be made prior to the damage period in the United Kingdom and Australia.
>
> • • • • •
>
> "I feel that in regard to both countries, it is unrealistic to believe that starting out from scratch they could have achieved the percentage of the market and the percentage of profits that Exhibit 220 indicates they might receive. *And as I have indicated, there is no question they lost money by virtue of the pools' excluding them.*
>
> "In regard to the United Kingdom, the Court is

not disposed to quarrel about the difference between June 1 and June 8. It appears to the Court that under the evidence, that a more realistic date in regard to Australia would be April 1, of 1960, and that for the period prior to April 1 of 1960, it would be unrealistic to indicate that Zenith suffered any economic loss by virtue of the pools.

• • • • •

"And for that reason, the Court rules—and I'm going to let you gentlemen figure out the mathematics of it—that in regard to the first calendar year after the damage period started, as I have indicated the dates, that there should be no lost profit in either the United Kingdom or Australia. That is the first calendar year.

"I believe that there is a growing increase in the market of a quality product such as Zenith, which would not have jumped as rapidly as Exhibit 220 indicates. So, in regard to the second calendar year, the Court finds that the damages would be 50 per cent of those indicated for the second period on Chart 220.

"In regard to the third calendar year, they would be 75% of the profits indicated by the amount indicated in the last column on 220.

"And in regard to the fourth calendar year, and I guess that only applies to the United Kingdom because of the differential of nine months involved, that the figures, the lost profits indicated in regard to the fourth calendar year, would be 100 per cent of the amount indicated on the lost profit or loss-of-sales item in the last column on Exhibit 220." (Italics ours)

On the basis of these remarks, the amended findings were drawn and filed (A. 3534-5, 3537) and the second judgment was entered (A. 3539). The Trial Court's findings in support of the second judgment were based on the following substantial and uncontradicted evidence.

1. England.

The largest and the most powerful radio and television companies in the world created the British Patent Pool and placed in it thousands of patents controlled by Pool members and those affiliated with them in the scheme. Among these companies the record shows Electrical and Musical Industries, Ltd., General Electric Company, Ltd., The Gramaphone Company, Ltd., Marconi's Wireless Telegraph Company Limited, Philips Electrical Industries Limited, RCA and British Thomson-Houston Co., Ltd. (Def. Ex. 52; A. 1205). Later other companies such as Murphy Radio Limited (Def. Ex. 54; A. 1228), E. K. Cole Limited (Def. Ex. 55; A. 1233), A. C. Cosser Limited (Def. Ex. 56; A. 1237) and Pye, Ltd. (Def. Ex. 57; A. 1243) were brought into the Pool.

The Hazeltine English patents were put into the Pool by contract with General Electric Company, Ltd. and the Pool income from these patents was split between General Electric and Hazeltine (Def. Ex's. 42-50; A. 1165-1193).

L. B. Dodds described the General Electric arrangement in a letter dated June 11, 1951 to Cornock of General Electric (Def. Ex. 73; A. 1409) as follows:

> "Under the terms of the Agreements between our companies identified as (a) and (b), your company is given the exclusive license under the Hazeltine patents in the specified field for the territory of 'Great Britain, Northern Ireland and Eire', together with the right to include such patents in the British Pool."

Cornock wrote Dodds under date of June 28, 1951 (Def. Ex. 74; A. 1411-12):

> "Under our main Agreement with the Pool, which is dated 31st August 1948 and of which I sent you a copy recently, we make the following representations and give the following undertakings: . . . (d) Clause 18 provides that no licenses shall, during the period of

the Agreement, be granted by any Party *except in accordance with the decisions of the Management Committee of the Pool.*" (Italics ours)

The documents obtained from the Hazeltine files show on their face how the scheme was devised to get Hazeltine patents into the Pool in a way to give them the largest possible share of Pool income (Def. Ex's. 42-50; A. 1165-1193).

The following excerpts prove this beyond question:

> "G. E. C. shall have complete freedom to use the British Hazeltine Patents as a bargaining asset in order to secure entry into the Pool as a Licensor, or the use of the Patents for the purpose of licensing third parties" (Def. Ex. 42; A. 1165).
>
> "4. As consideration for the rights granted by the [Hazeltine] Corporation to G. E. C. hereunder, G. E. C. shall (subject to the provisions of Clause 5 hereof and subject to approval of the British Treasury being first obtained) pay to the [Hazeltine] Corporation forty per cent of all sums received by the G. E. C. from the A.7 Pool by way of royalties upon the combined Patents of the [Hazeltine] Corporation and G. E. C. in the said Pool" (Hazeltine-G. E. C. Agreement dated February 27, 1953, Def. Ex. 48; A. 1183, 1185).

Pursuant to these agreements, G. E. C. placed Hazeltine patents in the successive British Pools during the damage period. This was evidenced by documents produced from the Hazeltine files (Def. Ex's. 50-60; A. 1190-1276).

On the face of these agreements there is disclosed a typical cartel or competitor's combination controlling the British radio and television market and excluding the competition of any exporting American company such as Zenith. Each of the participating companies, including Hazeltine, contracted that during the term of these agreements (Def. Ex. 58; A. 1248, 1251, 1258):

"Unless otherwise agreed *no licenses are hereby agreed to be granted to import Radio Apparatus* [defined to include television receivers] *into the United Kingdom or to deal in in the United Kingdom, Radio Apparatus or Radio Apparatus containing imported component parts* to an extent exceeding in value 10 per cent of the retail list price of such Radio Apparatus except in each case samples and experimental models for the use of the parties hereto." (Italics ours)

The last Pool agreement in evidence which by its terms ran until June 30, 1964 (Def. Ex. 60; A. 1272), provided, "(vi) Clause 11(g) shall be read as if the following words, 'Provided however that no variations shall be made in the terms and conditions of the said Licenses A8-S and A8-T without the unanimous consent of the parties hereto except the British Thomson-Houston Co., Ltd. as at the 30th June 1960 . . .' were inserted . . ." (Letter dated September 13, 1960 from Marconi Wireless Telegraph Co., Ltd. to G. E. C.; Def. Ex. 60; A. 1272, 1275).

The A8 license agreements (Def. Ex's. 70-71; A. 1380-1401), like all the preceding pool licenses (Def. Ex. 61, Paragraph 2(1), A. 1277, 1280; Def. Ex's. 62-69; A. 1287-1379) *are expressly limited and restricted to the manufacture of electronic products in the British market and to the sale of apparatus so manufactured.*

The A-7 licenses and all preceding licenses specifically provided:

"The Licensee agrees with the Grantors as follows: (a) Not without the previous written consent of the Grantors to sell within the said territory any Television Receiver which has not been manufactured in the territory for which this License is granted." (Def. Ex. 69; A. 1368, 1372).

All of the above documents were produced from Hazeltine Corporation files pursuant to an adverse party sub-

poena directed to plaintiff, Hazeltine Research Inc., thus confirming the fact that Hazeltine Corporation and Hazeltine Research were one and the same as later stipulated (A. 34, 55, 774).

Confronted with this documentary evidence, L. B. Dodds was forced to admit that he and his company were thoroughly familiar with the purpose of the Pool to get rid of foreign competition by blocking imports into England (A. 199-200, 209-10, 213-14, 220-1, 316-18, 379).

Dodds admitted the motive for Hazeltine's conduct in the following testimony (A. 331):

> "Q. Well, you had some point in being there and discussing the value of Hazeltine patents, didn't you?
>
> "A. Mr. McConnell, I stated previously that *my sole purpose there was to get more bucks for Hazeltine.*" (Italics ours)

Memoranda and correspondence with G. E. C. produced from Hazeltine's files conclusively establish the conspiracy allegations of the counterclaim with respect to the British Pool (Def. Ex's 73-86; A. 1409-73; Def. Ex's. 89-90; A. 1477-84; Def. Ex's. 96 and 97; A. 1504-10).

The purpose of the Pool to stop the competition of Zenith and other foreign companies is shown by a letter from RCA's foreign patent manager, Commander Mayer, who wrote RCA in New York as follows (Def. Ex. 91; A. 1484, 1487-8):

> "Schoenberg [the Pool manager] said that they could not agree to license foreign manufacturers to import into Great Britain, and he says this on the basis of his claim for exclusivity. In their view it would mean the immediate collapse of the whole licensing pool and of the revenue derived from it. They have always had to refuse to license imports from anywhere. British manufacturers are extremely jealous of importers, and although the Patent Act does not spe-

cifically support this attitude, there is no doubt that the old idea of patents giving a monopoly continues today and confirms a basis of a general licensing policy in Britain of using patents to build up trade and keep out cutthroat competition from foreign countries where prices may be cheaper."

In a letter by this same Schoenberg to Sarnoff of RCA (Def. Ex. 94; A. 1499, 1500) it is stated, "Of course, it is sometimes very difficult indeed to check importation because so many importers manage to get past our patents by dealing in components, and it is not easy to draw the line so as to mark off where the component ends and the assembled instrument begins, but we are doing our best to rope in those who are trying to dodge us by resorting to components."

The British Pool was active at the time the case was tried (Def. Ex. 60; A. 1272). Initially, the strength of the Pool was drawn from patents on radio receivers, but with the advent of television the Pool's position improved. This improvement was due in large part to the inclusion of Hazeltine's color television patents (See draft letter of Hazeltine's president to Heather of G. E. C.; Def. Ex. 93; A. 1497, Def. Ex. 76B; A. 1421, 1434).

The record shows that throughout the years Zenith made many efforts to enter the English market (A. 462-4, 473-4). On each occasion, however, the Pool threatened its distributors so they ceased buying Zenith products. The following illustrates how the cartel operated in England.

In a letter introduced in evidence, without objection, R. A. Rothermel, Ltd., London writing to Zenith says (Def. Ex. 101A; A. 1517-8), "To be quite frank, we do not see any possibility of marketing your product in Gt. Britain under the present license and patent situation. To be sure, American sets are being sold here, but it is a boot-leg proposition, run by the East end Jews who can afford to take

chances which people who operate in legitimate business cannot do. . . . I have no doubt but that today Zenith sets would be one of the largest selling lines in Gt. Britain. . . . We are always glad to hear from you and only wish there was some way to market your very attractive products in Gt. Britain."

In a letter to Zenith, admitted in evidence without objection, from J. Toubkin, a Zenith distributor, the working of the Pool is explained as follows (Def. Ex. 108; A. 1542, 1543):

> ". . . We have found it, however, advisable to restrict the sales to such dealers and wholesalers as could handle the line with discretion because, knowing the patent situation, we are fully aware that should the Patent Pool actually tackle the 'Zenith' receivers as such, then 'Zenith' will be finished in Great Britain forever and ever.
>
> "To explain that, I should like to point out that once the Pool goes after a particular make of American receiver and decides that no such sets should ever be imported, they have a fairly good method of doing so and they couple with that method also a fairly extensive campaign in the trade papers, advertising that particular make and stating that such and such dealers have had an injunction obtained against them for selling that particular make, and once such an advert appears in the paper, you can be sure that no dealer in Great Britain will ever handle the receiver again."

As we have pointed out in the discussion of the Canadian Pool, as a part of the RCA-Zenith settlement, Zenith was granted world-wide rights under the foreign patents of RCA, General Electric and Western Electric (Pl. Ex. 48; A. 2783-6), and as a result it attempted to sell radios in England (Def. Bulk Ex. 112; A. 1559-93). This could not be done with television sets (A. 463-4, 474). The Pool is armed with hundreds of television patents from Hazeltine and its foreign conspirators under which Zenith was

not licensed and could not get a license to import (Def. Ex's. 52, 58; A. 1205, 1248). Such patents include the British counterparts of the patents asserted here by Hazeltine (A. 131, 145). Without television Zenith could not develop the English market for radio alone. Zenith therefore never could obtain proper distribution for its products in England. (A. 463-4, 474; See also Def. Ex. 113, A. 1594-1606).

2. Australia.

The dominant electronics company in Australia is, and for many years has been, Amalgamated Wireless Asia (A. 90, 91-2), referred to here as A. W. A. The cartel arrangements assigned Australia exclusively to A. W. A. and the patents and inventions of all the members were placed in the Australian patent pool known as Australian Radio Technical Services and Patents Company, Ltd., herein called ARTS. Half of this organization is owned by A. W. A. The inventions and patents of A. W. A., Standard Telephone and Cables, Ltd., Philips of Holland, Electrical and Musical Industries, Ltd., Marconi Wireless Telegraph Company, Radio Corporation of America, Pye, Ltd. and Neutrodyne Proprietary, Ltd. were all included in the Pool (Def. Ex's. 180-195; A. 2305-2476). Neutrodyne is a controlled subsidiary of Hazeltine (A. 90, 93, 253, 796). The basic agreements relating to the operations of the Pool are in evidence as Defendant's Exhibits 180-195 (A. 2305-2476). They show that the cartel is in all essential respects the same as the English and Canadian pools.

Under a contract dated September 11, 1928 (Def. Ex. 180; A. 2305), still in force and effect, Neutrodyne is authorized to place all inventions and patents of Hazeltine in the ARTS pool (A. 2307) and is required to see to it that all of the requirements, restrictions and provisions of the standard license are contained in any future license

(Def. Ex. 180, Paragraph 2, A. 2307). Hazeltine patents and rights, existent and future, have gone into the Australian pool under this arrangement for 35 years (Def. Ex's. 188-195; A. 2381-2476) and during all this time have been licensed in such a way as to preclude and exclude any imports of radio or television sets into Australia (Def. Ex. 197; A. 2482, 2483), and the Pool has never granted a license to import American sets into Australia (Def. Ex's. 188-195; A. 2381-2476). The record is replete with conclusive evidence of Hazeltine's knowledge of and participation in the cartel restrictions (Def. Ex's 197-212; A. 2482-2512) right up to the trial of the instant law suit (Def. Ex. 212; A. 2512).

The only answer Hazeltine ever made to proof of their participation in the Australian Pool was by post-trial motion a year after the case was tried and findings entered, at which time Hazeltine's new counsel exhibited an alleged form 7 license of the Pool as an offer of proof in an attempt to show that the license did not by its terms prohibit importation (A. 2970, 2971-85). However, analysis of the tendered license shows that it was limited to local manufacture (See pp. 89-90 *infra*).

In Australia, as in the case of England, Zenith was unable to obtain distribution of its products as a consequence of the Pool policy against imports. Wright, Zenith's president, testified that he talked "with many people in Australia with a view to distribution, and there was no question in their mind that we could not get such a license [a license to import], and there was no use talking about any sort of arrangement that contemplated that" (A. 476; See also Def. Ex. 215; A. 2523-2590).

C. Proof of the Patent Misuse Defense.

The Trial Court found that Hazeltine has misused its patents by (1) refusing to license except under package deals, (2) coercing prospective licensees into executing licenses which covered unpatented as well as patented products and (3) putting the foreign counterparts in patent pools and restricting its domestic licenses to the United States pursuant to the conspiracy. These rulings will be found in Findings IV, V, VI, VII, VIII, IX, X, XI, and XII (A. 2893-98; 2857).

For many years plaintiff had acquired hundreds of patents by wholesale patent applications and by foreign and domestic agreements (A. 271). Through the years its practice had been to offer these hundreds of patents in a package license (A. 135; Def. Ex. 3; A. 985, 991) entitled its Standard License Agreement (Def. Ex. 2; A. 955-83), which conferred on the licensee for a 5-year period freedom from any charge of infringement under all present as well as future Hazeltine patents. Royalties were demanded and paid on the licensee's entire production, whether or not any of its products employed Hazeltine patents, present or future (Def. Ex. 2; A. 955, 959; A. 271). The license was really a covenant not to sue the licensee or its customers on the licensed patents. At the time of the trial, Hazeltine held over 500 patents in the electronics field and 109 patent applications (Def. Ex. 1; A. 937, 946-7).

Hazeltine has been "involved in extensive litigation" (Def. Ex. 32; A. 1127, 1128-30). The public records show over 175 Hazeltine patent cases. The staggering cost entailed in continually analyzing its patent claims has obviously been a powerful weapon in forcing electronic companies to take the package license.

Zenith, for many years acting under the obvious duress of Hazeltine's threat of litigation, signed Hazeltine's standard package license (Def. Ex. 2; A. 955). In May, 1959,

L. B. Dodds, plaintiff's counsel in this case, again demanded that Zenith sign a package license for a 5-year period at the then package rate of $50,000 a year (A. 434-5). Dodds asserted that Zenith was infringing at least four Hazeltine patents in the manufacture and sale of black and white television receivers (A. 435-6). Dodds said that licenses would be granted for black and white television, excluding color television, in accordance with the following formula:

> Any one patent in the package would be licensed at 50% of the royalty rate for the entire package of over 500 patents and patent applications. Any two patents would be licensed at 80% of the package rate. Any three or more patents would be licensed at 100% of the package rate. Hazeltine reserved the right to sue for infringement of any patent not licensed. All licenses would be subject to the terms and conditions of the standard form and would require payment of royalties on all production during the 5-year term of the license irrespective of whether any patent was employed or not (A. 436-7).

Zenith informed Dodds that none of the four patents asserted was valid or infringed by any Zenith apparatus and Zenith would not sign the Hazeltine package license (A. 435-6).

Hazeltine then served written notice of infringement of two patents on Zenith on October 15, 1959 (Def. Ex. 9; A. 1008), and then started the instant suit on November 20, 1959 (A. 1).

In March of 1963, when this case was approaching trial, Mr. Ruestow, respondent's patent counsel, made a further demand on Zenith (A. 428; Def. Ex's. 15-18; A. 1035-71).

He grouped together nine patents which he claimed were infringed in the manufacture of Zenith color receivers and on which he placed a royalty of $275,000 per year as applied to color receivers only (A. 428-30). He then asked, as an alternative, that Zenith take a license on all color TV patents

for an annual royalty of $300,000 (A. 430). For all present as well as future patents in the color field an annual license fee of $310,000 was demanded (A. 430). However, the package license for all patents present, future, black and white and color was still offered at an annual royalty of $200,000 (A. 431-2; 601-2).

Under Ruestow's offer a license under only two of the nine color TV patents could bear an annual royalty rate in excess of $200,000 (A. 602), and cover only color TV production, whereas the entire package could be had for $200,000 per year (A. 601-2).

This was an obvious attempt to compel Zenith to sign the package license *which would have admitted the validity and use of some 500 patents whose counterparts were in the Canadian, Australian and English pools* (A. 131, 272).

Crotty, Zenith's Patent Counsel, understood Hazeltine's approach to be a threat of litigation unless Zenith succumbed to Hazeltine's license demands (A. 439); indeed, the threat was real and Hazeltine planned bringing additional infringement litigation against Zenith on color television patents if Zenith failed to accept the standard license agreement (Def. Ex. 36; A. 1141, 1144).

The alternatives faced by Zenith by reason of these proposals were: defend trials and appeals on at least nine patents at an estimated cost of approximately one million dollars; take a license under the color package of nine patents at $275,000 per year or a license under the entire color package at $300,000 per year or $310,000 for present and future color patents whether any of the patents would be used or not. This would leave black and white TV production open to attack and plaintiff's counsel had already claimed infringement of four black and white TV patents (A. 431-2; 435-6).

Another alternative was to take a license under less than

all the package of nine patents in color, and pay over $200,000 per year (A. 602) which would expose Zenith's color production to attack by any color patents not licensed and would subject the entire black and white production to the assertion of any of the hundreds of patents in the Hazeltine package. A further alternative was to take the standard package license under all patents and patent applications of Hazeltine, present and future, for both black and white and color at an annual royalty of $200,000 per year (A. 431) and thereby admit the validity of all such patents and in effect the validity of all their foreign counterparts in the Canadian, English and Australian pools.

It thus appears that over a 5-year license period it would cost $500,000 to $550,000 more to take a license under the small color package than to take a license on all the Hazeltine patents. It is quite obvious that from a business point of view, the only practical alternative was to accede to Hazeltine's demand and sign the full package license.

However, because the foreign counterparts of the Hazeltine patents were in the foreign pools (A. 131, 272) and the Hazeltine package license was, by virtue of the conspiracy, expressly restricted to the United States (Def. Ex. 115; A. 1634; Def. Ex. 2; A. 955, 957, 958-9; Def. Ex. 18; A. 1044, 1046-7), Zenith really had no option but to refuse the package license and defend the present suit. Both the Trial Court and the Court of Appeals have held the patent in suit invalid (A. 2891; 4244, 4249).

While the Court of Appeals held that Hazeltine's offers of individual color patents at royalty rates substantially in excess of the annual rate for the package of all patents, color and monochrome, "constituted an illegal attempt to force acceptance of the standard package and a misuse of patents" (A. 4250), it reversed the District Court's finding of misuse with respect to the 50-80-100% offer for mono-

chrome patents (A. 4252). The District Court had found that Hazeltine's offer of one patent at 50% of the package rate, two patents at 80% of the package rate, and three or more patents at 100% of the package rate was "an attempt by economic coercion to force the taking of the package" (Finding XI, A. 2898). The misuse inherent in this formula was admitted by Hazeltine's chief patent counsel in a confidential memorandum (Def. Ex. 24; A. 1089, 1091):

> "... if I offer the 50%, 80%, 100% deal they [petitioner] pick 10 patents and zingo we are right back in misuse."

The Court of Appeals also reversed the District Court's finding of misuse with respect to Hazeltine's attempt to collect royalties on Zenith's entire production whether or not any patents are used (A. 4262). The District Court had found (Finding XII; A. 2898):

> "In all of its proposals to Zenith, Hazeltine insisted as an alternative to litigation that Zenith for a period of five years pay royalties in large sums based on its entire productions of receivers whether or not any Hazeltine patent was employed in any way in its products. Plaintiff thus insisted that royalties be paid on admittedly unpatented apparatus."

There was substantial evidence to support the District Court's finding of misuse in this respect also. The provision in the standard license that royalties were to be based on the licensee's entire production was not just a matter of convenience in computing royalties, but was an attempt to collect royalties on unpatented products and to discourage licensees from inventing around the applicable patents during the five year license term. This was shown by Hazeltine's own documents (Def. Ex. 38; A. 1148-9):

> "... Under the Hazeltine system of applying the royalty percentage to the selling price of the manufac-

turer's television sets regardless of what Hazeltine patents, *if any*, are used in the particular sets (in accordance with Hazeltine v. Automatic Radio) it would not make any practical difference in Hazeltine's income if he switched to the alternate . . . design [that doesn't use the licensed patents]." (Italics ours)

D. Hazeltine Corporation, the Parent Company, Is Shown by the Record to Have Been Properly Included in the Treble Damage Judgments Entered in Favor of Petitioner.

As the findings of fact submitted by both Zenith and Hazeltine clearly recognized (A. 2857, 2859, 2893; 2913, 2914) Hazeltine Research, Inc., the nominal plaintiff, is so organized, controlled and its affairs so conducted that it is a mere agent, division and alter ego of the Hazeltine Corporation. At a pre-trial conference on April 3, 1963, in the presence of the Trial Judge, all counsel agreed to a formal written stipulation whereby the "corporate fiction" between Hazeltine and Hazeltine Research, Inc. would be disregarded for the purposes of the instant litigation. This was formally recorded in a written pretrial stipulation dated May 7, 1963, upon which the Court and all counsel relied throughout the trial. In pertinent part it provides (A. 55):

> "The parties to this Action, by their attorneys, in fulfillment of certain understandings reached orally in the course of the pre-trial conference held herein on April 3, 1963, in order to simplify and expedite trial hereby stipulate and agree, for purposes of this Action only, as follows:
>
> • • • • •
>
> "4. Plaintiff agrees that for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company."

This stipulation was signed on behalf of Hazeltine by L. B. Dodds (A. 57).

Mr. Diggins, antitrust counsel for Hazeltine at the trial, openly referred to the foreign licensing activities of Hazeltine Corporation as the activities of "*we*," the party obviously in court defending:

> "The Court: I mean, why couldn't *you* have just retained them and issue licenses there as you do here?
>
> Mr. Diggins: Several reasons, your Honor. In the first place, the Pool is the big licensing agency up there [Canada]. Secondly, it would be quite an expensive operation to set up a policing agent, a licensing agency in Canada. If *we* did it in Canada, why not require *us* to do it in Great Britain, in Australia. And when you set up these policing agencies, it is just not worth while taking out the patents. Foreign patents are expensive anyhow. And if you have to police them and enforce them, your Honor, it is the old pipeline theory that sitting in New York or Chicago, and trying to enforce your patents against defendants in Canada, in Great Britain, in Australia, is a hopeless task." (A. 408-9) (Italics ours)

Mr. W. M. McFarland, the Chairman and Executive Vice President of Hazeltine Corporation wrote under date of March 4, 1963 to Mr. Philip LaFollette, a director and counsel for the company (Def. Ex. 1; A. 937, 953), informing him of how he proposed to deal with Zenith if it failed to settle this case and sign the plaintiff's domestic patent license agreement (Def. Ex. 56; A. 1141). He stated at page 4 (A. 1144) of this letter:

> "The conference with Zenith would be held as you suggested and if unsuccessful a new color suit would be filed against that company."[5]

5. In a memorandum produced in New York from the files of Hazeltine Corporation and obviously written during the course of this litigation, it was also stated:

It is thus established from this letter that Hazeltine Corporation by its Chairman and Executive Vice President McFarland together with fellow officers Dodds and Westermann (Def. Ex. 1; A. 937, 953), and general patent counsel Ruestow (A. 278-9), was beyond peradventure running the domestic licensing operation and enforcement litigation of its wholly owned subsidiary Hazeltine Research, Inc. which held title to the domestic patents. The plaintiff in this case, Hazeltine Research, Inc., is obviously the *alter ego of Hazeltine Corporation,* as recognized and stipulated in the pre trial stipulation.

Other documentary evidence relating to Hazeltine's domestic patent practices also proves that Hazeltine Corporation's executives dominated and completely controlled the subsidiary's actitivities. For example see:

Defendant's Exhibit 3 (A. 985), a "personal and confidential" memorandum under date of December 14, 1961, from L. B. Dodds, counsel in this case and a Vice President of Hazeltine Corporation, reporting to Mr. W. H. Wilson, a Director of Hazeltine Corporation (Def. Ex. 1; A. 937, 953).

Defendant's Exhibit 7 (A. 1102), a letter under date of August 8, 1951, on the stationery of Hazeltine Corporation written by Larry [Mr. L. B. Dodds].

Defendant's Exhibits 10-11, 13-14 (A. 1010-1012; 1032-1034), letters from F. W. Crotty, Vice President in charge of patents at Zenith, all addressed to Hazeltine Corporation, attention E. A. Ruestow, showing that the licensing demands made on Zenith came from Hazeltine Corporation in New York.

Defendant's Exhibit 22 (A. 1072), a copy of a memorandum by Mr. D. Westermann, Vice President and

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"II. *H. R. I.* v. *Zenith*—All legitimate steps before a final decree".

"III. Friendly meetings with Joe [Wright, President of Zenith] and Crotty [Vice President of Zenith in Charge of Patents] and if nothing materializes—commence forthwith suit on best color patent or patents." (Def. Ex. 35; A. 1141.)

general counsel of Hazeltine Corporation. The memorandum, dated February 8, 1963, is entitled "Tentative Rates, Etc., for Domestic Patent Licensing Program Worked Out in Meeting 2/7/63 by Messrs. Beam, Dodds, Ruestow, and Westermann, for Further Consideration." Mr. Beam is identified in the Annual Report of Hazeltine Corporation (Def. Ex. 1; A. 937, 953), as the President of Hazeltine Corporation. McFarland, Dodds, and Westermann were also all officers of the parent company and Ruestow was its general patent counsel.

Defendant's Exhibit 23A (A. 1080), "Company Confidential" memorandum under date of November 20, 1961, from E. A. Ruestow to W. H. Wilson, a Director of the parent company.

Defendant's Exhibit 26 (A. 1094), report by Ruestow to R. L. Beam and W. M. McFarland, the President and Executive Vice President respectively of the parent company, on the subject of the organization's *foreign and domestic patent operations.*

Defendant's Exhibit 29 (A. 1114), a memorandum under date of February 15, 1963, from E. A. Ruestow to R. L. Beam, President of the parent company on the subject of "license policy."

Defendant's Exhibit 31 (A. 1125), a report on the status of the Zenith litigation submitted by E. A. Ruestow to the Board of Directors' meeting of the parent company on April 17, 1963, advising that "Zenith is filing a counterclaim based on: (1) *our* alleged participation in an international conspiracy to block their foreign trade . . ." (Italics ours)

Defendant's Exhibit 34A (A. 1137), a proposal for new domestic royalty rates submitted under date of January 24, 1963, by L. B. Dodds, Vice President, to W. M. McFarland, Vice Chairman and Executive Vice President of the parent company.

Defendant's Exhibit 37 (A. 1145), a monthly report to Hazeltine Corporation Board of Directors' meeting of March 20, 1963, on the subject of Hazeltine's licensing activities.

Defendant's Exhibit 38B (A. 1155), a letter concerning domestic licenses dated December 12, 1952, by Mr. L. B. Dodds, as Vice President of Hazeltine Corporation, to Mr. K. H. Nalder, General Electric Company, Ltd., of London, England.

It is clearly apparent from this latter document that Hazeltine Corporation controlled and conducted Hazeltine licensing activities in the United States exclusively. At pages 2-3, Mr. Dodds stated (A. 1156-57):

"U. S. A: License Agreement

"We are entirely agreeable to the reassignment of the patents and patent applications which we acquire under this Agreement upon the termination of the Agreement subject, however, to one possible exception. As you may know, it is the practice of Hazeltine to grant a standard five-year license under all of its present and future [United States] patent rights. These five-year licenses do not run concurrently but are staggered so that should the Agreement between our companies be terminated for any reason, as of such date of termination we would have a number of licenses in existence in this country having periods of from one to five years to run. It might be quite embarrassing to cut off such licensees' rights in inventions derived from your company in the middle of their license period. Therefore, we should like to offer for your consideration the addition at the end of Clause 2 of this Agreement of the following:

> '. . . excepting non-exclusive license rights which the corporation may have granted in conjunction with license rights under its own invention rights which may be outstanding upon the aforesaid termination.'

"You understand that our License Agreements are very similar to the Pool License in that they are blanket licenses under all of our patent rights with no portion of the royalties specifically allocable to any

patent or patents. Therefore, the patent rights which Hazeltine might acquire from your company under this Agreement would not represent a source of additional revenue to it."

Consistent with the stipulation, the record and the understanding of the Court and all counsel, following the trial Hazeltine submitted the following proposed finding of fact:

"Jurisdiction and Parties

"8. It is stipulated that, for the purposes of this Action, Hazeltine and H. C. may be considered a single legal entity to avoid the issue of whether or not it is appropriate to 'pierce the corporate veil', but it is proper to consider the separate and unrelated activities of the two companies separately." (A. 2913, 2914.)

Hazeltine counsel further, on the basis of the proposed finding No. 8 quoted above, sought to have the Trial Court enter findings of fact and conclusions of law in favor of the Hazeltine Corporation on practically every issue in the case. See for example proposed findings Nos. 29, 30, 31, 32, 42, 47, 49(a), (b) and (c), 50, 51, 53, 55, 56, 57, 58, 60, 63, 64, 65, 66, 67, 68, 71, 82, 83 and 87, and proposed conclusions of law Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 (A. 2922-38).

In proposed finding of fact No. 82, Hazeltine asked the Court to find that (A. 2933):

"Neither Hazeltine nor H. C. [Hazeltine Corporation] has participated in any general plan or conspiracy the purpose and effect of which have been to restrain the export of radio and television receivers from the United States."

And in finding No. 87, the Court was asked by Hazeltine to hold (A. 2935):

> "There is no evidence linking Hazeltine or H. C. [Hazeltine Corporation] with members of the alleged 'international conspiracy'."

And, in Hazeltine's proposed conclusion of law No. 9, it asked the Court to rule that (A. 2937):

> "The bilateral agreement between H. C. [Hazeltine Corporation] and CRPL currently in force is a lawful agreement, the primary purpose and effect of which is to enable H. C. [Hazeltine Corporation] to obtain a fair royalty return under its Canadian patents."

And in proposed conclusion of law No. 10, the Court was urged to find that (A. 2937):

> "The bilateral agreement between H. C. [Hazeltine Corporation] and CRPL currently in force does not constitute a contract, arrangement, plan, or conspiracy in restraint of trade between the United States and Canada."

After the Court refused to enter Hazeltine's proposed findings, which would have given the parent company legal permission to continue its participation in the illegal patent pools, Hazeltine employed new counsel who attempted to persuade the trial court that the stipulation that former Hazeltine counsel had so accurately described in their proposed finding No. 8 did not mean what it said (A. 3008, 3009-12, 3019-30, 3042-47). The Trial Court rejected this contention and entered the judgment against Hazeltine Corporation, the parent company, as well as against its subsidiary (A. 3078).

Hazeltine's new counsel in a petition for mandamus contended that the Trial Court had no power to enter a judgment against Hazeltine Corporation. The petition was denied by the Court of Appeals on April 7, 1965 (A. 6). Thereafter, Hazeltine Corporation filed motions in the Court of Appeals to vacate the April 5 and December 13,

1965 judgments as to it, again based on the same asserted lack of jurisdiction of its person (A. 8). By orders of the Court of Appeals dated August 16, 1965 and December 13, 1966 these motions were taken with this case (A. 9) and on December 13, 1967 were sustained and Hazeltine Corporation was dismissed "for want of jurisdiction over its person" (A. 4236).

SUMMARY OF ARGUMENT.

I.

CANADIAN CARTEL FINDINGS.

The undisputed evidence shows that the Canadian patent pool known as Canadian Radio Patents, Ltd. was organized in 1926 by the General Electric and Westinghouse companies through their Canadian subsidiaries, and has as its shareholders Canadian radio and television manufacturers, most of whom are subsidiaries of American companies and are Zenith's competitors both in Canada and in the United States. The Canadian pool was organized and operated by the conspiring companies for the express purpose of excluding the importation of American manufactured radio and television receivers into Canada.

The Pool's standard license is limited to local manufacture. The Pool at all times has refused to grant a license to import and over the years has sued and threatened with infringement suits sellers and users of unlicensed imported sets. No American manufacturer could sell imported sets without subjecting itself, its dealers and its customers to ruinous infringement litigation.

Respondents' patents were placed in the Canadian pool pursuant to an exclusive license agreement between Hazeltine and CRPL, which agreement grants the pool the right to use Hazeltine's present and future patents in its licensing and litigation activities. Hazeltine, before entering into its exclusive arrangement, was fully aware of the purpose of the pool to prevent importation of American receivers into Canada. Through Hazeltine and its co-conspirators

CRPL has amassed about five thousand patents applicable to television and radio receiving sets.

The only defense ever attempted by respondents in the trial court was the contention that under Canadian patent law a patentee risks loss of his Canadian patent if he licenses importations. This defense was proved false at the trial and was abandoned in the Court of Appeals.

Respondents, by knowingly participating in such an international cartel or patent pool arrangement having as its purpose the restraint of American foreign commerce, are co-conspirators in a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act.

(a) Fact of Damage Caused by Petitioners' Inability to Obtain an Import License.

Respondents' documents prove that petitioner had to have an import license from CRPL in order to compete effectively in the radio and television business in Canada, but that neither Zenith nor anyone else could obtain such a license under the pool patents because of the conspiracy between pool members and patent holders to block importation.

Zenith repeatedly sought an import license and brought an antitrust suit in Chicago seeking to force the pool to grant such a license. Zenith was then advised by letters and by the answers filed in that suit that importation would not be permitted and only local manufacture would be licensed. Zenith officials testified without denial that in the absence of an import license responsible management could not spend the time nor invest the money necessary to properly develop the Canadian market when petitioner could not protect itself or its distributors and customers from patent infringement suits and threats and confiscation of its products. For this reason petitioner was unable to develop the Canadian market.

Cogent proof of the fact of damage to Zenith's Canadian business was the evidence introduced by respondents that three of the pool members, namely, RCA, General Electric, and Western Electric had paid Zenith $10,000,000 in October, 1957, in settlement of previously incurred damages occasioned petitioner by the pool in Canada. As co-conspirators respondents were bound by this admission because it was made in the course of the conspiracy and as part of an effort to keep the pool alive, which pool had income of over $1,000,000 a year.

As late as June 5, 1959, CRPL's manager, in response to Zenith's request for a license to import, advised Zenith that it was infringing patents in the Canadian pool including a Hazeltine patent, and sent Zenith a standard form of license forbidding imports as the pool's answer to Zenith's request. Subsequent thereto and pursuant to the conspiracy the instant suit was filed on a Hazeltine patent, the Canadian counterpart of which was in the pool. In October, 1961, while this suit was awaiting trial, Hazeltine also asserted nine color television patents against Zenith which it claimed controlled color television, and the counterparts of which patents were also in the Canadian pool and were licensed in Canada only for Canadian manufacture. If Zenith took a United States license under Hazeltine's domestic patents and thereby admitted the validity of the patents, Zenith would then lose any defense to the assertion against it by the pool of the Canadian counterpart pool patents.

The Court of Appeals holds that a patent pool composed of Zenith's competitors, operated by a permanently staffed CRPL, and preventing licensing of the Hazeltine patents to cover export products does not constitute overt activity which can cause any damage at all to Zenith's business. This holding in effect sanctions the death of Zenith's foreign trade at the hands of an illegal cartel.

(b) Amount of Damage.

In an antitrust case an accepted measure of the amount of damage caused by an exclusionary conspiracy is a comparison of the profits enjoyed by the victim in a free market with those earned in the market curtailed by the conspiracy. Particularly is that so where it is the only measure of the amount of damage available to the petitioner. That measure of damage was employed in the present case and was supported by competent evidence admitted without objection by Hazeltine.

Zenith's officers testified without contradiction that but for the Pool restrictions on imports and threats Zenith could have enjoyed the same percentage of the Canadian market as it did in the United States (20%) since the two markets were in all essential respects comparable.

Zenith's books and records underlying its damage computation were proved to have been kept in the regular course of business and Hazeltine's counsel stipulated that they were accurate. These records were employed by Zenith's manager of internal auditing in the preparation of defendant's exhibits 218 and 220, used as proof of the damage calculations. He testified from the damage exhibits, his work-sheets, and on the basis of his computations and the market percentage described, that lost profits in Canada during the damage period for both radio and television aggregated $6,297,391.

The testimony of Zenith's officers plus the damage exhibits constitute substantial, and in the absence of denial conclusive evidence of the amount of damage under the decisions of this Court.

II.

THE ENGLISH AND AUSTRALIAN CARTEL FINDINGS.

The evidence showed that the British Patent Pool was created by the largest and most powerful television and radio companies in the world, including British General Electric, Marconi, RCA and Phillips. Hazeltine's English patents were placed at the disposal of the Pool pursuant to agreement between Hazeltine and British General Electric, and Pool income from these patents was split between the two companies.

Under the agreement Hazeltine gave British General Electric the exclusive licensing rights under Hazeltine's British patents in Great Britain, Northern Ireland, and Eire, together with the right to include the patents in the British Pool. Hazeltine undertook to grant no licenses under its British patents and pursuant to agreement no licenses would be granted except in accordance with the decisions of the Management Committee of the British Pool. Under the terms of the pooling agreement which ran through June, 1964, each of the participating companies, including Hazeltine, agreed that no licenses would be granted to import television and radio apparatus into the United Kingdom.

The dominant electronics company in Australia is Amalgamated Wireless Asia (AWA). Under the international cartel arrangements the Australian market was assigned exclusively to AWA and the patents of all members were placed in the Australian Patent Pool known as Australian Radio Technical Services and Patents Company, Ltd. (ARTS). Half of this organization is owned by AWA, and the patents of AWA, Standard Telephone & Cables, Philips, Electrical and Musical Industries, Marconi, RCA,

and Neutrodyne were all included in the Pool. Neutrodyne is the controlled subsidiary of Hazeltine.

Under a contract dated September, 1928, and still in force, Neutrodyne is authorized to place all patents of Hazeltine in the ARTS Pool, and is required to see that all of the restrictions and provisions of the standard license are employed. Hazeltine patents, existent and future, have gone into the Australian Pool under this arrangement for thirty-five years, and during all this time have been licensed so as to preclude and exclude all importation of radio and television sets into Australia. The Pool has never granted a license to import American sets into Australia.

(a) The Fact of Damage in England and Australia.

The record shows that throughout the years Zenith made repeated efforts to enter the English market, but on each occasion the English Pool threatened its distributors so that they ceased buying Zenith products. Potential distributors reported that they could see no possibility of marketing Zenith's products in Great Britain under the licensing practices of the British Pool. Such importation as could be effected had to remain a limited and covert operation in order to avoid patent infringement litigation and confiscation of Zenith merchandise.

Similarly, in Australia no effective distribution could be obtained because of the Pool prohibition on import and the hazards of patent infringement litigation and confiscation of goods. Zenith's president testified that he had conferred with many Australian businessmen with a view to setting up distribution, but such arrangements could not be effected and were futile because Zenith could not get a license for importation.

The only claim made by Hazeltine to support its contention that Zenith suffered no injury in these markets is

that Zenith did not make useless demands for a license to import which the record shows could not be obtained. This claim is erroneous as a matter of law.

(b) The Amount of Damage in England and Australia.

The record evidence in Australia and England, as in Canada, with respect to the amount of damage stands uncontradicted and was admitted without objection. Zenith's executive vice president testified that free of Pool restrictions Zenith could have obtained during the damage period 5% of the English market and 2% of the Australian market. Because of the pre-damage period government restrictions, these percentage figures were substantially reduced by the Trial Court and an amended damage finding was entered fixing damages in England at $5,058,026 and in Australia at $248,460.

III.

THE PATENT MISUSE DEFENSE.

The trial court also found that Hazeltine had misused its patents by attempting to force Zenith to sign a standard package license agreement covering patents Zenith could not use and which license would have prevented Zenith from contesting the validity of Hazeltine's foreign counterpart patents placed in the patent pools.

In May, 1959 Hazeltine demanded that Zenith sign such a five-year standard package license and at the same time asserted that Zenith was infringing at least four Hazeltine patents in the manufacture of black and white television receivers.

Zenith informed Hazeltine that none of the four patents asserted were valid and that it would not sign a package license agreement covering unused patents and entailing

royalty payments based on Zenith's entire production of patented and unpatented apparatus. Hazeltine replied that a non-package license would be granted for black and white television only under a formula whereby any one patent would be licensed at 50% of the royalty rate for the entire package, any two patents would be licensed at 80% of the package rate, and any three or more patents would be licensed at 100% of the package rate. When Zenith rejected this proposal, Hazeltine served notice of infringement of two patents and started the instant suit.

During the pendency of these proceedings, Hazeltine's executive vice president further informed Zenith that the latter was infringing at least nine Hazeltine color television patents. In April, 1962 Zenith was told that it could obtain a license under the nine color patents at an annual royalty rate of $435,000, or a package license covering all of Hazeltine's present patents, both for color and black and white, for $150,000 a year. In March, 1963 Hazeltine made a further demand on Zenith to accept a license under the nine color patents at an annual royalty of $275,000 or, under all color patents at an annual royalty of $300,000. However, a package license for all black and white and color patents, both present and future, was offered at an annual royalty of only $200,000. This was an obvious attempt to compel Zenith to sign a package license which would have admitted the validity and use of some 500 Hazeltine patents, the counterparts of which Hazeltine had placed at the disposal of the Canadian, English, and Australian Pools in order to block importation.

Hazeltine's internal memoranda established that Hazeltine's officers were fully aware of the misuse danger but chose to enforce the package rate structure and "run the risk of running afoul of the law".

IV.

INJUNCTIVE RELIEF.

The same record that established Zenith's claims for damages also of necessity established its right to injunctive relief because proof of actual damage from an illegal continuing conspiracy carries with it the threat of future damage which can only be prevented through the award of injunctive relief. Even if no actual damage had been shown, on this record the threat of injury to a company seeking to export its products into Canada, England and Australia is obvious and future damage to American companies can only be prevented by injunctive relief.

V.

THE DISMISSAL OF HAZELTINE CORPORATION.

The Trial Court had jurisdiction over Hazeltine Corporation by a pretrial stipulation, wherein it was stipulated that HRI and Hazeltine Corporation were "one and the same company" in order "to avoid the issue of whether or not it is appropriate to 'pierce the corporate veil'." There was no lack of due process as found by the Court below because Hazeltine Corporation voluntarily appeared before entry of judgment against it and had a full hearing on the construction of the stipulation, Dodds' authority to make it and whether in all the circumstances Hazeltine Corporation was a party.

ARGUMENT.

I.

PETITIONER AS A PERSON EQUIPPED TO COMPETE IN THE RADIO AND TELEVISION BUSINESS IN CANADA, ENGLAND, AND AUSTRALIA WAS INJURED IN ITS BUSINESS AND PROPERTY BY THE RESPECTIVE PATENT POOLS WITHIN THE MEANING OF SECTION 4 OF THE CLAYTON ACT.

(a) All Petitioner Had to Prove Under the Act Was a Violation of the Act and Injury to Its Business Resulting Therefrom.

In the case of *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738, 743 (C. A. 3, 1945) the Court said:

> "The purpose of the anti-trust laws—an intendment to secure equality of opportunity—is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete."

As the largest producer of television sets and the second or third largest producer of radios in the United States (A. 456-7), Zenith Radio Corporation was shown to be equipped to compete in the three markets involved.

We have shown in the Statement of the Case that the proofs in this record make out a clear case of intentional injury to petitioner's electronic business in three foreign markets. While there is talk by the Court below of the so-called "fact of damage" and while there has been a great deal of confusion raised by some Court of Appeals decisions holding that the fact of damage must be proved to a legal certainty, Section 4 of the Clayton Act itself makes no such requirement. The words of the statute re-

quire only that the plaintiff "be injured in his business or property by reason of anything forbidden in the antitrust laws." Under the decision of this Court in *Bigelow*, discussed below, the so-called fact of damage can be proved just as any other fact in contested litigation by a preponderance of the evidence or by proofs from which a court can reasonably infer that an injury has taken place.

Earlier decisions of the Seventh Circuit Court of Appeals applied the proper rule of construction to Section 4 of the Clayton Act. In the case of *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417, 419 (C. A. 7, 1942), the Court said:

> "The language of the statute is general and all inclusive. It includes any person who shall be injured in his business or property. * * *"

The Court further said (p. 420):

> "We may not by what seems to be a strained and unjustified limitation bar plaintiff from the statutory remedy. 'Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law.'"

See also, *Congress Building Corp.* v. *Loew's Incorporated*, 246 F. 2d 587, 594 (C. A. 7, 1957); *Dairy Foods, Incorporated* v. *Dairy Maid Products Coop.*, 297 F. 2d 805, 809 (C. A. 7, 1961).

This Court in the case of *Radovich* v. *National Football League*, 352 U. S. 445, 453-454 (1957), expressly pointed out to the lower Federal Court that:

> "Petitioner's claim need only be 'tested under the Sherman's Act's general prohibition on unreasonable restraints of trade' . . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibitive activities are injurious to the public and has provided

sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. . . . Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of Section 5 of the Clayton Act. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

To prove injury to its business petitioner was not required to negative every other possible cause of injury. Under a proper construction of the Act, it was enough if respondents materially contributed to petitioner's injury, or "substantially contributed, notwithstanding other factors contributed also", *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (C. A. 1, 1948). Petitioner need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Company* v. *Union Leader Corporation*, 333 F. 2d 798, 805-806 (C. A. 1, 1964). See concurring opinion of Mr. Justice White in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, ... U. S. ..... (June 10, 1968).

Moreover, in determining whether there was substantial evidence to support the Trial Court's finding that Zenith's foreign commerce had been "drastically curtailed" by the patent pools (A. 2908), the Court of Appeals was required to view the evidence in the light most favorable to petitioner, giving it the benefit of all inferences which the evidence fairly supported. The rule is succinctly stated by this Court in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 696 (1962) as follows:

"The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary infer-

ences might reasonably be drawn. From our examination of the rather extensive record, we have concluded that the Court of Appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to Continental's business."

The Court below, in *First Nat. Bank of Colorado Springs* v. *McGuire*, 184 F. 2d 620, 625 (C. A. 7, 1950), previously held:

> "The question of the weight of the evidence was for the trial judge, and we may not disturb his findings unless they cannot be sustained upon any rational view of all the evidence including all reasonable inferences of which the testimony is susceptible; that is, we are authorized to reverse the judgment only if in our view the findings of fact are clearly erroneous."

See also *Stacher* v. *United States*, 258 F. 2d 112, 116 (C. A. 9, 1958).

In holding that petitioner failed to prove "the essential *fact* of damage" (A. 4254) the Court of Appeals has completely departed from the principles of these decisions. The Court has added conditions and evidentiary burdens to Section 4 which simply do not appear. An example is the Court's holding that petitioner had to make an explicit demand for an import license during the damage period (A. 4256, 4258) notwithstanding the fact that the evidence conclusively established that such a license was unavailable. See pp. 91-6 *infra*. Moreover, the Court has tortured the record to draw inferences contrary to the District Court's findings which were supported by substantial evidence. In some instances, the Court below has drawn inferences directly in conflict with the undenied testimony of witnesses whose demeanor and credibility only the Trial Court was in position to judge.

Thus in its opinion the Court below refers to a letter from

the pool threatening a Motorola distributor with an infringement suit for importing unlicensed sets, which threat occurred during the damage period, as the basis for an inference that because a Motorola distributor was threatened no Zenith distributor was threatened (A. 4258). This contrary inference is drawn in the face of direct undenied testimony that the pool did threaten Zenith with infringement suits within the damage period. Frank Crotty, a Zenith vice president, testified without denial that Brain McConnell, the pool manager, threatened suit on a Hazeltine patent administered by the pool. McConnell told Crotty in a conference on May 12, 1959, that Zenith was infringing pool patents, "one of which was a patent of Hazeltine origin. He told me that I would have to take a license; that the license could not be for importation, it would have to be for local manufacture" (A. 410-12). This conversation was not denied by McConnell or anyone else.

Following the May, 1959 meeting McConnell wrote Crotty on June 5, 1959 (the letter was received within the damage period) enclosing the pool's standard license which expressly refused to license imported sets and gave notice of infringement of a CRPL patent (Defendant's Ex. 154; A. 2021). Parenthetically, such a notice is a customary and accepted way of threatening an infringement suit and is the final step taken before instituting litigation. In the letter McConnell advised (A. 2021):

> "With regard to the patent and its use in Zenith television receiver No. B-2225, I have had this matter reinvestigated and there is no doubt in our minds that the invention covered by the patent is used in this receiver. The tests show this quite conclusively."

Following this the instant suit was filed in November, 1959, on a Hazeltine patent whose counterpart was included in the Canadian patent pool (A. 131, 272). This was conceded by respondents' counsel at the trial (A. 131). Fur-

ther Hazeltine threatened Zenith with suit on nine color patents, the counterparts of which were also in the Canadian Pool (A. 419; Def. Ex. 10; A. 1010; A. 131, 145-6).

The Court below in its opinion also completely misapprehended the effect of the warning notice which came to Zenith's attention in September of 1958 (Def. Ex. 138; A. 1879, 1880). This warning notice, expressly addressed to all importers of radio and television sets in Canada, covered all of Zenith's potential customers. The notice appeared in the "Trade Builder", a Canadian trade publication with a wide circulation, and the Pool admitted it published such "warning" notices repeatedly. Defendant's Exhibit 144 (A. 1973, 1974) states with reference to the notice: "we are continuing to periodically run the warning Notice in the trade publications." This statement was made by CRPL. The Court below refers to this document as an "advertisement" (A. 4258). Actually, it was a threat to the television industry in Canada that they would be sued if they handled, sold, or used Zenith's unlicensed sets. The notice stated (Def. Ex. 138; A. 1880):

> "Canadian Radio Patents Limited desires to inform importers, vendors, purchasers or users of radio or television receivers and other electronic devices and equipment incorporating inventions owned or administered by Canadian Radio Patents Limited and not manufactured under license from Canadian Radio Patents Limited that they will be held liable for patent infringement."

The Court of Appeals holds as a matter of law that such a notice threatening every actual and potential customer of Zenith in Canada with an infringement suit could not possibly injure Zenith's Canadian business. In other words, the pool can with impunity issue such a notice continuously in trade papers without incurring any liability whatever under the federal antitrust laws, even though

the notice obviously was intended to and sought to induce a boycott of Zenith products in Canada.

The holding of the Court below ignores the letter of Wright to McConnell of the pool stating that Zenith's business was injured by these threats and Wright's testimony that "a distributor for resale must make a rather substantial investment in an inventory of goods to handle. He has got to do a lot of work in hiring salesmen and in developing a territory, and we just found that it was impossible to get anyone who was willing to take that sort of risk with this threat of infringement hanging over them" (A. 453).

Wright testified about this specific document as follows (A. 458):

> "Q. Now will you tell the Court what effect, what residual effect has remained from the activity of this Pool even after the settlement that you made with the three defendants in the Zenith litigation?
>
> "A. Well, it is typified by this ad in the Trade Builder. Here is a threat by an apparently respectable organization which is composed of companies like Canadian General Electric and the Telephone Company in Canada and Westinghouse, Philips, the Marconi group, everyone that handles our produce from the user on up to the distributor is going to be sued. This has a serious effect on your ability to get the kind of distributors that you would need to do the kind of marketing job that we have been talking about, to be able to get them to make the kind of an investment and do the promotion and the advertising and to build a sales force that will do it."

Here is an experienced, competent executive whose testimony as to the causal connection between the Pool's "warning notice" and the injury to Zenith's Canadian business is not denied. In the face of this the Court of Appeals holds as a matter of law that there is no evidence in the record

that this document published repeatedly in trade circles or any other activity of the Pool had any adverse effect on Zenith's sales.

The Court below also states that Zenith claimed to be fully licensed as a result of the 1957 Zenith-RCA settlement (A. 4258) from which it infers Zenith did not want or need a Pool license. This is a distortion of Wright's letter (Def. Ex. 138; A. 1882) and misstates the record. As part of the settlement Zenith obtained licenses under the foreign patents of RCA, G.E. and Western Electric only. These licenses were limited to existing patents and expressly excluded color (Pl. Ex. 48; A. 2783). The Court of Appeals draws this inference in the face of the District Court's contrary findings (Findings XXIX, XXX; A. 2905) and the undenied evidence that the Pool claimed it held patents, including Hazeltine patents, under which Zenith was not licensed and which Zenith was infringing (Def. Ex's 151-2; A. 2014-18). Also ignored is the undenied testimony that after 1957 Hazeltine was asserting nine color television patents which were in the Canadian pool (A. 419-20; Def. Ex. 10; A. 1010) and which Hazeltine claimed covered the entire television field as it related to color television (Def. Ex. 1; A. 946). A Canadian license on these patents because of the conspiracy could not be obtained unless Zenith built a factory, which would cost millions of dollars, and manufactured sets in Canada (Pl. Ex. 50-A; A. 2811, 2829-30; A. 454, 392, 410; Def. Ex. 150; A. 2013).

The Court of Appeals reaches the further astounding conclusion that because Zenith actually sold 60,000 TV sets through its wholly owned Canadian distributor and obtained five per cent of the market in Canada in television sales, it therefore as a matter of law could not show that it would have obtained a greater share absent the pool (A. 4258-9). The damage exhibit gave credit for the amount of profit

Zenith actually made in Canada during the damage period (Def. Ex. 220; A. 2661). The testimony of Wright and Kaplan that free of the pool in Canada Zenith could have sold the same share of the Canadian market as it did in the United States, namely, twenty per cent, was not denied by testimony or exhibits, nor in any manner impeached by cross-examination. The Court below not only failed to give this evidence the required weight but in effect rejects it entirely by holding the Trial Judge "made a mistake" in inferring from it that Zenith was damaged (A. 4258-9).

Further, the Court of Appeals' conclusion that any interference with petitioner's business short of total exclusion from the market does not constitute injury is wrong as a matter of law. Thus, this Court in *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 44 (1930), said:

> "In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties . . ."

The Court of Appeals brushes aside the evidence of the Pool's continued operation during the damage period with the remark that "even if the continuous existence of the unlawful conspiracy was, as Zenith claimed, a continuous overt act, the fact of damage must still be shown" (A. 4260).

We respectfully submit that the continuous overt act of the existence of the pool during the damage period was part of the so-called fact of damage. The pool was well known to the trade. Its activities in suppressing the competition of importing companies was likewise well known to the trade. Its warning notices threatening infringements suits, also well known and well publicized in the trade (by its own admission it put out "4,343,084 advertising messages to help put a stop to importation" (Def. Ex. 130; A. 1863)), together with its other well known ac-

tivities proved it a continuing threat to anyone who undertook to import Zenith sets into Canada. Actually, this was shown by respondents' own evidence. They introduced in evidence a report of a Canadian Royal Commission (Pl. Ex. 50-A; A. 2811) which they sponsored and whose recitals were binding upon them. This report stated (A. 2830):

> "*The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.*
>
> "CRPL indicated that it does not grant a license to any importer of radio or television receivers, except in the limited situation where the type or kind of radio or television receiver sought to be imported *is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.*
>
> "It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . ." (Italics ours)

Further, a lawyer by the name of Henderson whose law firm worked for the Pool and who was called and sponsored by respondents as their witness testified on cross-examination as follows (A. 701, 703-5):

> "Q. Now, you told us this morning that you knew what the policy, the licensing policy of CRPL was and that, as I understood you to state it, the policy was not to license imports where there was manufacturing in Canada.
>
> "A. That is correct.
>
> "Q. Now, imports that come in, in the electronics

field, would represent competition to the owners of this pool, would it not?

"A. Certainly.

"Q. No question about it, is there?

"A. I would have thought not.

• • • • •

"Q. (Reading)

'The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.' . . .

By Mr. McConnell:

"Q. Was that considered? . . .

"A. Of course they considered it. They have written it. They considered that aspect of the matter and they referred to it in the report.

By Mr. McConnell:

"Q. And they had before them the benefit of whatever CRPL had submitted, is that right?

"A. Of course.

• • • • •

"Q. Well, do you consider that a company like Zenith Radio exporting its sets into Canada is competition for the members of this pool? . . .

"A. Well, I have already told you that I don't know the nature of their—the full scope of their activities. You have shown me their licensees. I am now assuming that they are manufacturing and selling sets and, certainly, if they are manufacturing and selling radio sets in Canada, your exportation into Canada is competition.

"Q. So this report then says that in the face of 5,000 patents it would— 'it is doubtful if anyone could sell in Canada a radio or television receiver.' Is that right?

"A. That is what it says.

"Q. And that would include the Zenith Radio Company, wouldn't it?

"A. It would include anyone as at that time who sought to sell in Canada radio receiving sets, that is right."

In the face of this testimony the Court below says "The facts in this case do not resemble those in *Continental Ore* v. *Union Carbide*, 370 U. S. 690, where there was clear evidence of defendant's refusal to deal with the Continental Company, as a result of which it had to drop out of the vanadium business" (A. 4260).

Here, as we have shown, the refusal to deal is proven conclusively by testimony and exhibits put into the record by respondents themselves.

The Court's further statement that the patent pool, even though it might be considered as a continuous overt act during the damage period, could not as a matter of law cause any damage to the petitioner, is likewise disposed of by the above report, which expressly states (Pl. Ex. 50-A; A. 2830):

"It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission."

This report was referring to a time in 1959, within the damage period. The document concedes that the existence of this pool designed to preclude importers from bringing sets into Canada was obviously a constant threat to Zenith and to Zenith's customers. The entire record shows that this threat had been enforced against importers and there is no testimony in the record that the policy has ever been changed. Even as late as a year after the trial of the case, in a hearing on Hazeltine's motion to withdraw the anti-trust findings, counsel for respondents admitted the fact (A. 3036).

Further, the Court of Appeals holds as a matter of law

that nothing happened during the damage period that could possibly injure Zenith's business even though it was conceded that the pool remained in operation during the entire damage period and even though it was alleged and proved and the trial court found that the instant suit was brought in furtherance of the conspiracy. Thus, the counterclaim filed May 22, 1963, alleged (A. 67-8):

> "The filing of this suit and the threats to file other infringement suits against counterclaimant on any number of patents in the Hazeltine pool were acts employed to effectuate the conspiracy alleged herein and to compel by economic coercion the signing of counter-defendant's package license. In turn either the signing of the license or a finding of validity and infringement in this suit will signal and lend overwhelming support to attacks on counterclaimant's export trade by the foreign pools under foreign patents covering the same inventions."
>
> "... Because of the pendency of this suit and counter-defendant's other charges of infringement described in paragraph 7 above, counterdefendant has been forced to delay expansion of its foreign trade in England, Canada, Australia and other countries where, in furtherance of the conspiracy alleged herein, counter-defendant's inventions and patents are employed to restrain and prevent importation and trade."

The Trial Court determined this issue along with all other antitrust issues in the case in favor of Zenith, as follows (A. 2857):

> "The Court has reviewed the evidence, exhibits and briefs of the parties on both the patent and antitrust phases of the above cause and finds for the defendant on the issues raised by the complaint and answer and the counterclaim."

That the Trial Court's ruling was correct is shown by the opening statement of Mr. Dodds, counsel for Hazeltine (A. 131-2):

> "Mr. McConnell speaks repeatedly about these pools keeping out sets. These pools don't have any power to keep out anything. They are not a government body. All it means is that if you import goods into Great Britain or Canada or Australia, and if what you are importing are infringements of the patent they administer, you may subject yourself to an infringement suit, the same as if you infringe a patent in this country. *And we can't prevent Zenith from selling sets without an adjudication, which we are in the process of trying to get now.*" (Italics ours)

This was a clear admission that Hazeltine was trying to get an adjudication of an infringement of a patent held by the pool which could be used by the Canadian pool to stop Zenith's export trade. The Canadian courts recognize the validity of Canadian patents where their American counterparts have been upheld in American courts. *American Arch Co.* v. *Canuck Supply Co., Ltd.*, 3 Dominion Law Reports 567, 570-1 (1924); *Canadian Industries Ltd. & Canadian G. E.* v. *Sherwin-Williams Co. of Canada, Ltd.*, 1946 Ex. C. R. 65, 5 C. P. R. 6, 56 (1945). In *American Arch* the Court said (pp. 570-71):

> "The United States Patent which is identical in terms with the Canadian Patent, was declared valid in a case of the *American Arch Co.* v. *Universal Arch Co.* (1922), 290 Fed. Rep. 647, by Mack, Jr., in the District Court of United States, and his decision was affirmed by the Circuit Court of Appeals.
>
> * * * * *
>
> A strong presumption in favor of the validity of the patent is created . . . by the judgment herein above referred to."

Thus if Hazeltine had won the instant patent suit, or if it can sustain any of the nine color patents currently being asserted against Zenith, the Pool could use that judgment to establish the validity of the Canadian counterpart patent in an injunction or damage suit against Zenith in Canada. Certainly, the Trial Court was free to draw the inference that Hazeltine, a member of the conspiracy, was acting pursuant to the conspiracy in bringing the instant suit and was therefore directly responsible for the resulting curtailment of Zenith's business, testified to by both Wright and Kaplan.

The inference was buttressed and corroborated by Dodds' opening statement quoted above and by the terms of the standard license tendered Zenith by the respondents. It provided:

> "Section 3. Nothing herein contained, and no act or acts hereunder, shall be construed as, or result in, conveying any license to Licensee, expressly or by implication, estoppel or otherwise . . . (b) Under any patents of countries foreign to the United States; . . ." (Def. Ex. 2; A. 955, 958.)

This provision was an essential part of the conspiracy because it specifically prevented the application of court decisions holding that the grant of a domestic license also grants a license by implication to the foreign counterpart patent (*Curtiss Aeroplane & M. Corp.* v. *United Aircraft E. Corp.*, 266 Fed. 71, 77-80 (C. A. 2, 1920)) which would bring respondents in violation of their agreements with their foreign conspirators not to license except through the pools.

This was also conceded in a letter written by Dodds, where he stated:

> "In those countries where the Hazeltine patents are included in an industry-wide pool they are, of course, beyond our control and our licensees have to make their own arrangements with such pool." (Def. Ex. 115; A. 1634.)

The instant suit was brought on one monochrome patent but Hazeltine asserted that Zenith was infringing at least four such patents (A. 435-6).

Subsequent to the instant suit, Hazeltine, on October 18, 1961, also asserted nine color television patents against Zenith (A. 419; Def. Ex. 10; A. 1010). The counterparts of these patents were also in the Canadian pool and were licensed in Canada only for Canadian manufacturers (A. 131, 145-6; Def. Ex. 118; A. 1645, 1648). The Court of Appeals can find no demand for a license to import by Zenith after 1953 but the instant suit asks for an injunction against these very restrictions written into Hazeltine's Patents by their agreements with the Pools. The Hazeltine answer denies Zenith's right to such a license (A. 71).

The dilemma the assertion of these television patents placed Zenith in was serious. If it took a package license under Hazeltine's domestic patents, it thereby admitted the validity of all the foreign counterparts in the pool and lost any defense to an infringement suit on the patents regardless of whether the patents were valid or not (Def. Ex. 2; A. 955, 971). Further, since it could obtain no license in Canada unless it manufactured the sets in Canada, Zenith, as testified to by Wright, Zenith's president, had of necessity to curtail its operations in Canada until the outcome of the instant suit could be determined (A. 453). Every time Zenith sold a set it created another potential liability to the Pool.

The trial court on this evidence not only held the assertion of the patents to be pursuant to the conspiracy, but properly held that putting the patents in the pools under the circumstances in this case was a violation of the anti-trust laws (A. 2911-12).

This record gives conclusive evidence that the continuation of the pool constitutes a continuing threat to peti-

tioner's business which is subject to a monetary evaluation. Thus in a settlement of Zenith's earlier suit against three members of this pool the so-called fact of damage caused by the existence of the pool was shown by settlement papers introduced in evidence by respondents themselves. That evidence showed that Western Electric, RCA, and General Electric as members of the pool paid Zenith $10,000,000 for damages occasioned Zenith's business by the Pool in Canada up to October, 1957 (A. 466; Pl. Ex. 48; A. 2783, 2785-6). These co-conspirators of respondents were Zenith's competitors in Canada and had operated the Canadian patent pool since 1926, and were thoroughly familiar with every facet of the pool's activity and its effect on an importer's business. The *RCA* case damage settlement was on account of the same pool activity as was shown to have continued in the instant case. The Court of Appeals holds as a matter of law that this evidence is not relevant in determining the impact of such a patent pool upon Zenith's market for television and radio sets in Canada (A. 4261) even though respondents contended that they were co-conspirators and, therefore, entitled to use the settlement release against the damage claim accruing after the settlement (A. 2944-5).

The Court below has further reached the conclusion that the injury to petitioner's Canadian business cannot be proved by the admission of the co-conspirators themselves made in the course of their conspiracy (A. 4260-1) where by the settlement of the lawsuit they were seeking to get rid of a serious attack on the pool and to preserve intact the very pool complained of here, out of which they were receiving approximately $1,000,000 a year in license fees (Def. Ex. 142; A. 1964-5). This evidence was introduced by respondents themselves without any qualification whatever (Pl. Exs. 38-48; A. 2697-2786).

Any fair reading of the Court of Appeals' decision re-

quires the conclusion that the only way petitioner could prove any damages from the respondents' admitted violation of the antitrust laws would be to search out each potential customer in each market and then estimate how much business would have been gained if such customers had not been intimidated by the pool. In a case such as this a lifetime would not be time enough to even find the evidence, let alone put the proof into the record. Its application here gives the pools complete immunity from treble damage suits and *carte blanche* to ruin Zenith's foreign commerce.

(b) The Amount of Zenith's Damages in Canada Is Proven by Competent and Conclusive Evidence Stipulated as Accurate and Admitted in Evidence Without Objection.

As the court below agreed in the *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 566 (C. A. 7, 1951), "... '[I]f the *fact* of damage is proved, the *amount* may be reasonably approximated if based upon competent evidence.' "

It has long been the law that in an antitrust case an accepted measure of damages arising from the curtailment of a market is a comparison of the results in a free market with the results in the curtailed market during a comparable time. See *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561-4 (1931).

And in *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877, 883 (C. A. 7, 1945), the Court of Appeals for the Seventh Circuit while reversing a jury verdict on the issue of damages, laid down the rule that the proper measure of damages was the difference between a theater's profits in an open market as compared to profits earned in a restricted market. The Court of Appeals there found that no open market existed which could be used for comparison and therefore erroneously reversed a jury verdict.

This Court, however, in turn reversed that decision and said (327 U. S. at p. 265):

> "'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights."

Certainly the monopoly of patents known as CRPL prevented Zenith from obtaining a patent license to import Zenith sets into Canada and was a proven invasion of Zenith's rights. It was admitted in a document produced from Hazeltine's files that lack of a patent license was as much of an impediment to trade as a tariff barrier (A. 169).

Joseph S. Wright, Zenith's president, testified without objection that Zenith was the number one producer of television sets in the United States in both units and dollars (A. 456) and that Zenith was among the top three producers of radios in the United States (A. 457). He said that the Canadian market was comparable to that in the United States in that Zenith's competitors in Canada were principally Canadian subsidiaries of the same competition Zenith had in the United States (A. 457). He said that prices were lower in the United States than in Canada and that styling and other features of the sets were more advanced in the American market (A. 457).

He then testified without objection or denial as follows (A. 457):

> "I am convinced that with the kind of quality product we make and the reputation we enjoy both here and in Canada, that taking away these clouds and difficulties that we have had with the Pool, these patent matters, that we could build up to a similar percentage of industry in Canada that we have in the United States."

Wright then said that if Zenith had not been subject to "this kind of pressure in the trade among dealers, among distributors and among customers, that we would certainly, over this period of time, have built up a business that would have been comparable in Canada to what we enjoy here in the United States" (A. 461).

"Q. You mean that you would have an equal percentage of the business in Canada against that competition."

"A. That's right, that is correct." (A. 461.)

Samuel Kaplan testified that he was the chief financial officer of Zenith and that he had been employed by the company since 1923 (A. 523). He was examined on the foundation proof of Zenith books and records used in the damage computation.

"Q. Can you tell us whether or not those books are kept in the regular course of business, and whether or not they are accurately kept?

"Mr. Dodds: Your Honor, I stipulate that they are kept in the regular course of business and are accurate. No question about it.

"The Court: All right. That solves that." (A. 524.)

Dodds then objected to the testimony as duplicating Wright's testimony and said, "I am perfectly willing to stipulate that Zenith has had problems in exporting their radio and television receivers to Canada." (A. 524.)

Kaplan further testified that in the preparation of Defendant's Exhibit 220 (A. 2661), he gave the witness Stevenson the percentage used in making the damage calculation for Canada (A. 527-8). This figure was based on his opinion (A. 528):

"that we could accomplish in Canada the same percentage of industry that we were able to accomplish in the United States.

"Now, this took into consideration the similarities between the countries, the effect of our advertising which overlaps and spills back and forth between the countries, and the nature of our competition."

The witness also assumed that Zenith would be "free of the restrictions which we have had evidence of in this case" (A. 528).

The computation of the amount of Zenith's damages in Canada was prepared by Willis Stevenson, a certified public accountant, and a member of the American Institute of Accountants and the manager of internal auditing at Zenith (A. 495-6).

The witness testified as to the source of his figures, as to the different product lines of Zenith television, radio, hi-fi, stereo and color television during the four years preceding the filing of the counterclaim but he did not include color television (A. 501-2). He testified how he tabulated it by five periods starting June 1, 1959, and ending May 31, 1963, and the witness produced his work sheets showing his computations (A. 502; Def. Ex. 218; A. 2621). The figures in Canada were transcribed from government sources in Ottawa, Canada (A. 505), and the whole computation was put together as Defendant's Exhibit 220 (A. 2661).

In computing the lost sales in the Canadian market caused by the combination and conspiracy complained of, the witness said (A. 513-4):

"In the Canadian market we have started with a base of the market, which I have previously described, for each of the five periods. We have applied the Zenith share of the domestic market [the United States] expressed as a percentage for each of these five periods to arrive at a Zenith share of the Canadian market, expressed in units.

"The Court: Assuming their share would be what, the same as it is in America or what?

"The Witness: The same as it is in the United States."

The witness then said (A. 514):

"From that number of units I have deducted the number of units we actually sold in the Canadian market in each of those five periods to arrive at the lost sales in the market, expressed in units. To those units I have applied a Zenith average factory selling price to Canada of sets, within those five periods, actual experience of our selling price—to arrive at the lost sales in that market expressed in U. S. dollars at the factory selling price level. . . . To the figure of lost sales in the market, I have applied the percentages of profit applying to additional volume of business and arrived at the lost profit on the lost sales, also expressed in U. S. dollars."

The witness said he followed that same method for each of the five periods (A. 514) and tabulated the computations on Defendant's Exhibit 220 (A. 513).

The witness testifying from the schedule, his work sheets and on the basis of the formula described, said lost profit in Canada for the period June 1 to December 31, 1959, in television was $708,028.00 and in radio, $138,048.00 (A. 517); for the period 1960—television, $1,116,597.00 and for radio, $145,871.00 (A. 518); for the period 1961—television, $1,348,867.00 and radio, $68,241.00 (A. 518); for the period 1962—television, $1,883,774.00, and radio, $75,622.00; for January through May, 1963—television, $769,630.00 and radio, $43,213.00 (A. 518).

After this testimony, defendant's counsel asked for and received copies of the work papers and time for an opportunity to review them with his own accountant before cross-examining the witness. Both requests were granted (A. 519). Dodds also asked for and received copies of Defendant's Exhibits 218 and 220 (A. 519, 521) "as well as copies of these cost sheets of Mr. Stevenson" and had

time from Friday noon until the following Monday afternoon to study them with his accountant (A. 521).

The witness Stevenson was recalled the following Monday afternoon as an adverse witness and cross-examined by Dodds, assisted by Hazeltine's accountant, on all the items contained in Defendant's Exhibits 218 and 220 (A. 726-69), following which the exhibits were admitted in evidence without objection (A. 769).

Hazeltine then called as a witness Myron R. Hartley, a graduate of De Paul and Chicago Universities who had worked as an accountant for five years for the accounting firm of Peat, Marwick, Mitchell & Co. and three years for Arthur Andersen (A. 770) who was asked (A. 770):

> "Q. Have you examined these groups of papers which I show you comprising Defendant's Exhibits 218 and 220?
> "A. Yes, sir."

This accountant did not deny the accuracy or method of computation used in these exhibits or their content. No contravening evidence was ever offered by other documents or by oral testimony and since there was no objection to their admission in evidence, the competency of the documents is established beyond question. The only question presented here is whether they constitute any evidence at all in support of the Trial Court's damage findings.

Here the trier of the facts, who was an experienced trial judge, concluded that in Canada Zenith was damaged by the pool. We have already pointed out that this finding was based upon direct and uncontradicted testimony of Wright and Kaplan that if the pool restrictions "had been removed Zenith could have obtained the same" 20% of the Canadian market as it obtained in the United States, basing such testimony on the fact that the competition was the same, that the advertising in the two markets over-

lapped, that many of the Canadian sets were picking up broadcasts from the United States, that the two countries used the same scanning signals, and generally were identical markets, the only difference being that in one the pool maintained restrictions against American products while in the United States no such restrictions were imposed.

That the testimony of Wright, Kaplan and Stevenson plus the exhibits 218 and 220 constitute substantial, and in the absence of denial, conclusive evidence in proof of the amount of damages is expressly held in *William H. Rankin Co.* v. *Associated Bill Posters of U. S., Etc.*, 42 F. 2d 152, 155 (C. A. 2, 1930) where the Court said:

> "The fact that this amount of the plaintiff's damages could not be expressed in exact figures did not make them speculative. There was no speculation as to the fact of actual damage. Its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damage it has suffered."

The evidence, whose competency was sustained in the *Rankin* case, was described by the Court as follows (p. 155):

> "In its proof of damages, Rankin was permitted, under objection and exception, to show by the testimony of its treasurer and by a compilation he had made, based on the net profits of the business in 1911 and from his knowledge of business conditions when free of the defendants' unlawful interference, what he considered would have been the normal increase of this plaintiff's business from year to year. He was permitted to estimate on this basis its probable yearly earnings from July, 1913, to June 30, 1918, and to explain how his figures were arrived at. . . . The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy

in his reasoning or testimony. *Whatever may be said of its weight, and that was entirely for the jury,* we have no difficulty with its admissibility." (Italics ours)

Even the Court below in other cases has followed the *Rankin* doctrine and quoted it with approval in the case of *Grepke* v. *General Electric Company,* 280 F. 2d 508, 513 (C. A. 7, 1960). There it said (p. 512): "On the record before us we would be limited to the question (if raised by defendant) of whether *there is a failure of any evidence* that plaintiff was damaged. Only if defendant raised that question and if we find in defendant's favor on that question, can we say that the district court erred as a matter of law in overruling defendant's motion for a directed verdict. . . ." (Italics ours.)

Again, that Court in the case of *A. C. Becken Co.* v. *Gemex Corporation,* 272 F. 2d 1, 5 (C. A. 7, 1959) said that the language which we have quoted above in the *Rankin* case must be applied in determining whether the proof of damages was speculative.

Moreover, the Wright and Kaplan testimony, that absent the pool restrictions Zenith would have enjoyed the same share of the Canadian market as it did of the United States market, has been corroborated by Zenith's actual experience while operating under the protection of the decree. (See Petition for Rehearing pp. 2-3; A. 4265, 4266). The record does not include figures as to Zenith's sales or market percentage in the post-decree period because the case was pending on appeal. However, United States Department of Commerce, Bureau of the Census, Export Statistics reflect a dramatic increase in dollar exports of television sets to Canada starting in 1966. These figures are reproduced in Appendix B to this brief and the court can take judicial notice of them. See *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U. S. 320, 332 (1961). They show that dollar exports of television and radio increased from

$7,237,176 in 1965 to $14,538,417 in 1967 (App. B, Schedule 1; A-25). Also reproduced in Appendix B to this brief are duly certified copies of the Export Sales Reports filed by Zenith with the Bureau of the Census (App. B; A-27-A-41). These show a corresponding increase in Zenith's exports to Canada in the post-decree period—from $5,988,000 in 1965 to $9,078,000 in 1966 and to $12,694,000 in 1967 (App. B; Schedule 2; A-26).

The Court of Appeals says that the District Court made a mistake in inferring from the entire record that the "essential *fact* of damage" had been established by Zenith (A. 4254). With all due respect to the Court below, the District Court needed no aids by inference. The testimony in support of the District Court's findings of both fact of damage and damage amount was direct and conclusive and not rebutted in any way. These were fact issues and as shown the Trial Court's findings were supported by substantial evidence. That the Court of Appeals would have reached a different conclusion does not make the damage findings "clearly erroneous" within the meaning of Rule 52 (a).

(c) Zenith's Damages in England and Australia Were Proven by Substantial Evidence.

Sam Kaplan, Zenith's executive vice president, testified that, free of the restrictions of the pools, Zenith could have obtained during the damage period 5% of the English radio and television market and 2% of the Australian market (A. 528-30). Because of government licensing restrictions which were not removed until June, 1959 in England and April, 1960 in Australia, the Trial Court reduced these figures and assessed damages in lower amounts (A. 3524-6). The amended computation is shown at A. 3534-5. Defendant's Exhibit 220 (A. 2661) shows the amount of these damages as originally computed. Respondent's trial

counsel stipulated that the figures were accurate and made no objection to the admission in evidence of Defendant's Exhibits 218 and 220 (A. 524, 769). In *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 566 (C. A. 7, 1951), the Court of Appeals for the Seventh Circuit said:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that it was within the province of the trier of the facts to rely upon the computation there disclosed, providing, of course, there was proof of the fact of damage."

In *Bordonaro Bros. Theatres* v. *Paramount Pictures*, 176 F. 2d 594, 597 (C. A. 2, 1949), the Court said:

> "Damages in such a situation necessarily cannot be assessed with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject matter admitted.' . . . *Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy.*" (Italics ours)

In the case of *Small* v. *Schultz*, 180 F. 2d 351, 352 (C. A. 7, 1950), the Court of Appeals for the Seventh Circuit said:

> "It is understandable that defendant would not appreciate the limitations upon us as a reviewing court. She does not realize that the question of damages cannot be tried *de novo* in this court."

In spite of its own holding in *Small* v. *Schultz*, the Court below retried the damage issue in England and Australia *de novo*, not on basis of the original record but apparently relying largely on offers of proof made more than a year after the case was tried and after findings of fact adverse to respondents' contentions had been entered by the Trial Court.

The Court of Appeals, while conceding that a conspiracy

existed in both England and Australia, disposes of both markets by saying that there was no evidence that Zenith was prepared to enter the English or Australian markets (A. 4256-7). This ignores the fact that during the entire damage period Zenith had a distributor in England (A. 463-4) and that Zenith sought distributors in Australia but was unable to obtain them because of the Pool (A. 476).

The Court below found that "Significant barriers other than patent difficulties operated to prevent sales of Zenith TV receivers in England" (A. 4257). The Court says, "Zenith sets manufactured in the United States operated on 525 line and 625 line scan signals. The English standard was a 405 line signal until changed to 625 line after the damage period. Zenith sets sold in England would be in competition with substantially lower priced British sets" (A. 4257). From this the Court of Appeals inferred that Zenith was not prepared to enter the English market, if at all, until the "change in English standards to a 625-line system" (A. 4257). This contention was made in the Court below by respondents substantially on the basis of post-trial offers of proof which petitioners had no opportunity to meet (See respondents' brief on the anti-trust issues in Court of Appeals, pp. 102-4, 158-62). Apart from this, however, it is apparent that the Court of Appeals was deciding the issue as if it were the trier of fact and free to draw inferences contrary to the Trial Court's findings which were supported by substantial evidence.

The Court further said: "Zenith was not aided in showing loss of probable profits, by the testimony that its man in England could adjust Zenith sets to the English standard 'with a screwdriver in the back of the shop in a few minutes' " (A. 4257). There is no such testimony in this record. Sam Kaplan, Zenith's Treasurer, did testify that there were no "profound problems" which would prevent Zenith from adapting its sets to the English standards, as illustrated by the fact that Zenith's distributor could make

the changes himself. This testimony was as follows (A. 530-1):

"Q. I take it you took into consideration, in making that estimate, the tariff, the nature of the competition, and all relevant factors which you would know you would need in this kind of a market, is that correct?

"A. That's correct.

"The Court: Would a different picture tube be necessary in England and Australia than you use here or in Canada?

"The Witness: No. Well, in Australia I understand that the polarity of the picture tube has to be changed because they are in the other hemisphere. But it is a tube that we make here and can ship there. We do ship such type tubes to South America. In England and Canada, they would be identical.

"By Mr. McConnell:

"Q. . . . Well, let me ask you this, is there anything, to your knowledge, in Great Britain or England, which would prevent you from making television or radio tubes which could utilize the broadcast of the British Broadcasting Company?

"A. Nothing at all, nothing at all.

"Q. You could put that on a regular assembly line here, could you?

"A. There are no profound problems that we either don't handle or are not capable of handling.

"Q. Well, let me ask you this, haven't you actually made sets at Zenith that can be used in the British market?

"A. Yes, we have.

"Q. I mean televisibn and radio.

"A. That is right."

On cross-examination, Kaplan further testified (A. 545):

". . . Q. Now, it is my information that if you are going to scan at 525 lines or 405 lines, you need a different kind of scanning system. It has different numbers in it.

"A. Mr. Dodds, I would like to answer by saying that this difference is so profound that our distributor changes them in his back room.

"Q. On a laboratory or hand basis, not on the production of several thousands or hundreds of thousands of receivers.

"A. No, but I think this illustrates the extent of the difference."

There was no denial of this testimony, and there is no other evidence in this record on the issue.

Similarly in the case of Australia the Court of Appeals states: "Actually, high import duties and shipping costs posed a formidable barrier to Zenith sales" (A. 4256). Again this contention was made by respondents in the Court below entirely on the basis of post-trial offers of proof (See respondents' brief on antitrust issues in Court of Appeals, pp. 115-6, 152-5) and is contradicted by Kaplan's testimony which the Trial Court had a right to rely on that he had taken into account all relevant factors such as tariffs and shipping costs in making his market share estimate (A. 530).

(d) The Proofs of Cartel Restrictions in Australia.

The Court below also says there is no proof of use by "the Australian patent pool of restrictive license forms to prevent import" (A. 4256). Again on this issue the proofs that the licenses precluded importation were documentary, conclusive and not denied (Def. Ex.'s 188-195; A. 2381-2476).

The dominant electronics company in Australia is, and for many years has been, Amalgamated Wireless Asia (A. 90, 91-2), referred to here as A. W. A. The cartel arrangements assigned Australia exclusively to A. W. A. and the patents and inventions of all the members were placed in the Australian patent pool known as Australian Radio Technical Services and Patents Company, Ltd., herein called ARTS. Half of this organization is owned by A. W. A. The inventions and patents of A. W. A., Stand-

ard Telephone and Cables, Ltd., Philips of Holland, Electrical and Musical Industries, Ltd., Marconi Wireless Telegraph Company, Radio Corporation of America, Pye, Ltd. and Neutrodyne Proprietary, Ltd. were all included in the Pool (Def. Ex's. 180-195; A. 2305-2476). Neutrodyne is a controlled subsidiary of Hazeltine (A. 90, 93, 253, 796). The basic agreements relating to the operations of the Pool are in evidence as Defendant's Exhibits 180-195 (A. 2305-2476). They show that the cartel is in all essential respects the same as the English and Canadian pools. See *supra* pp. 35-36.

Both Dodds of Hazeltine and Warner, the manager of Neutrodyne, knew that their agreements were illegal under the American antitrust laws. In a letter of January 15, 1959, Warner wrote to Dodds: "No formal agreement between ourselves can be enforced in any Court of Law, so that after we have 'dotted the i's and crossed the t's' and argued about the clauses, they will still be unenforceable. In fact, we can only hang together with good will and good intentions . . ." (Def. Ex. 205; A. 2500, 2501).

The only answer Hazeltine ever made to proof of their participation in the Australian Pool was by post-trial motion a year after the case was tried, at which time Hazeltine's new counsel exhibited a form 7 license of the Pool as an offer of proof in an attempt to show that the license did not by its terms prohibit importation (A. 2970, 2971-85).

They argued that such license showed on its face that there was no restriction on imports at the time of the damage computation (A. 2970). The Court of Appeals in its opinion accepts this contention although an examination of the license itself disproves the contention. Thus, it first recites that "the Licensee claims to be a bona fide manufacturer of broadcast sound receivers and/or television receivers and/or radio gramophones and as such manufac-

turer has applied to the Grantor to grant and the Grantor has agreed to grant to the Licensee a license under the Letters Patent and upon the terms and conditions hereinafter mentioned." (A. 2971-2.) Parenthetically it is obvious that the only patents to be licensed were Australian patents and the only license an Australian patentee could grant for manufacture was to manufacture in Australia. This was made perfectly clear from further provisions of the license agreement. Condition 4(b) was "To attach or cause to be attached in a prominent position to all broadcast sound receivers, television receivers, and radio gramophones sold or hired or offered or exposed for sale or hire by the Licensee, . . . a plate marked by the Grantor with a Serial Number determined by the Grantor . . . and bearing the following words; . . . 'This instrument was manufactured under a License granted by Australian Radio Technical Services and Patents Company, Pty. Limited in respect of Letters Patent controlled by it for the reception in the Commonwealth of Australia . . .'." (A. 2977.) ARTS could not issue a license to manufacture in the United States because it had no U. S. patents. Its license to manufacture was to manufacture in Australia under Australian patents.

From this it is abundantly clear that unless the set was manufactured under the Pool's Australian patents, no plates would be forthcoming. There was a further provision that if the plate was removed from the set then, "the absence of such a plate so marked from any broadcast sound receiver or television receiver or radiogramophone shall be conclusive evidence that the same is not licensed hereunder" (A. 2978).

Even if this offer of proof form 7 license were in evidence we most respectfully submit that the holding of the Court of Appeals that an American exporter could be licensed with this license on sets manufactured in America is a patent and obvious error.

II.

A DEMAND UPON PATENT POOLS AND THEIR MEMBERS FOR A PATENT LICENSE PERMITTING IMPORTATION WHICH IS NOT AVAILABLE IS NOT A CONDITION PRECEDENT TO MAINTAINING A TREBLE DAMAGE ACTION UNDER THE ANTITRUST LAWS.

The Court of Appeals finds that the record shows no injury to petitioner's business occasioned by the respective patent pools because among other things (a) "there is no evidence that Zenith ever attempted to obtain a license from the Australian pool" (A. 4256), (b) that in Canada Zenith "did not seek a pool license after 1953" (A. 4258), and (c) "We think it is unreasonable to infer that Zenith intended to and was prepared to enter the English television market during the damage period" (A. 4257). These statements are made in the face of the uncontradicted testimony of Wright that he had interviewed numerous people in Australia preparatory to starting business there and was advised that a pool license to import into Australia was not available (A. 476), the uncontradicted testimony of Crotty that McConnell of CRPL told him in 1959 that the only available license was for local manufacture and that "the license could not be for importation" (A. 410), and the fact that Zenith had a distributor for television sets in England during the entire damage period (A. 463-4).

The Trial Court found with respect to Australia that (Finding XXXIV; A. 2907) "A standard pool license imposes the restrictions necessary to effectuate the division of territories involved in the overall arrangements. It requires the licensee to agree not to export or import or sell or offer for sale in Australia any radio or television receiving apparatus not manufactured in Australia." See Defendant's Exhibits 188-195; A. 2381-2476.

The Trial Court also found "the organization, purposes and intentions of the Canadian pool are in principle identical to those of the English pool. Approximately 5,000 patents are amassed for licensing and the only form of license available is strictly limited to manufacture in Canada." (Finding XXVI; A. 2003-4). See Def. Ex. 123, Article II, § 1; A: 1721, 1725; Def. Ex. 150; A. 2013; Def. Ex. 162D; A. 2053-65).

The Trial Court also found that in England all the electronic companies contracted "that the only license employed by the Pool would be a standard package license limited to local manufacture" (Finding XVI; A. 2900). See Def. Ex's. 61-71; A. 1277-1401.

In the face of these findings the Court of Appeals holds in effect that petitioner had to make a perfectly useless and futile demand of the respective pools for a license to import, which license was not available, in order to show injury under Section 4 of the Clayton Act. This decision conflicts with this Court's holdings in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690 (1962) and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, ... U. S. ..... (June 17, 1968). In *Continental* this Court held that a futile demand was not a condition precedent to a treble damage action, saying (p. 702):

> "In spite of the refusal of respondents to deal with Continental in November, 1943 and in previous months and years . . . the court ruled that Continental must have requested oxide from respondents after the contract with Imperial was signed in January of 1944. We think the jury should be allowed to determine whether respondents' conduct materially contributed to the failure of the Imperial venture, to Continental's damage."

This Court further said on the demand point the following (p. 699):

> "Furthermore, we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply."

In disposing of a similar contention in *Hanover Shoe* this Court in a footnote held "We also agree with the courts below that in the circumstances of this case it was unnecessary for Hanover to prove an explicit demand during the damage period." ..... U. S. ....., n. 5.

We submit that this Court's decisions in *Continental Ore* and *Hanover Shoe* dispose of the demand issue. However, it should be pointed out that the decision below also directly conflicts with the decision of the Tenth Circuit in *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416 (C. A. 10, 1952). There the Court held that even in the absence of a demand for a license, a refusal to license patents plus circularizing the trade with statements that plaintiff was not licensed, as was done in the instant case, was bound to cause injury to the plaintiff and established without more proof the fact of injury, the Court saying (p. 425):

> "[T]he unlawful acts of Kobe induced a continual boycott of the Dempsey product and prevented sales by Dempsey and Specialty and caused substantial damage."

In England each of the participating companies in the pool, including Hazeltine (A. 1251), contracted that during the term of these agreements:

> "Unless otherwise agreed no licenses are hereby agreed to be granted to import Radio Apparatus [defined to include television receivers] into the United Kingdom or to deal in in the United Kingdom imported Radio Apparatus or Radio Apparatus containing imported component parts to an extent exceeding in value 10 per cent of the retail list price of such Radio Apparatus except in each case samples and experimental models for the use of the parties hereto." (Def. Ex. 58; A. 1248, 1258.)

The record shows that Hazeltine patents and rights, existent and future, have gone into the Australian pool for thirty-five years (Def. Ex. 188-195; A. 2381-2476). During all this time they have been licensed in such a way as to preclude and exclude any imports of radio or television sets into Australia (Def. Ex. 197; A. 2482, 2483), and the pool has never in its history granted a license to import American sets into Australia (Def. Ex. 188-195; A. 2381-2476). The import statistics referred to by the Court of Appeals (A. 4256) actually corroborate this. Thus during the damage period only 53 American made TV sets were imported into Australia (A. 3399).

While the Court of Appeals says that the petitioner sought no license in Canada from the pool after 1953, the Trial Court found (Finding XXIX A. 2905) "To ward off these attacks Zenith attempted to get a license from the Pool, but in every instance it was advised by the Pool manager that importation would not be permitted and, only local manufacture would be licensed." The finding was supported by the record (A. 410, 451; Def. Ex. 146-154; A. 1982-2021). The record shows that McConnell, the pool manager, told Zenith that no license was available for importation at a time within the instant damage period (A. 410; Def. Ex. 154; 2021).

Moreover, in stating that Zenith had not sought a license after 1953, the Court of Appeals ignored the fact that from 1953 to 1957 petitioner was suing three of the members of the pool for the refusal of the pool to license imports. That suit itself was a constant demand for a license to import, and was settled in October of 1957 by not only a payment of $10,000,000 but by the grant to Zenith of royalty free worldwide rights under the patents of the three defendant companies (Def. Ex. 114; A. 1607-33; Pl. Ex. 48; A. 2783, 2785). The settlement papers disclose that Zenith not only sought but obtained from three members of the pool a license to

export to foreign markets. However, these licenses were limited to black and white patents which existed at the time and expressly excluded color patents (Def. Ex. 114; A. 1607-33). And the Canadian Pool was quick to point out that it held other import patents in television, including Hazeltine patents, under which Zenith was not licensed (Def. Ex. 151; A. 2014; Def. Ex. 152; A. 2017).

We have already pointed out that as late as June, 1959 the pool was threatening suit on pool patents if Zenith did not sign a standard license which did not permit importation and provided that Zenith would have to manufacture in Canada any products it intended to sell there. No pool witness or any other witness denied this testimony.

The legal effect of this factual situation is succinctly set forth in *Kobe,* 198 F. 2d at p. 424 of the opinion, as follows:

> "There is no merit in the contention that defendants cannot maintain their crossclaim because Kobe did not refuse to grant a license to Demsey upon reasonable terms. The truth was that such a license was never requested by defendants and was never refused. No attempt was made to prove that such a license would have been granted had the request been made. In all the years which Kobe manufactured pumps, no license was ever granted to anyone else and the licenses which were reserved in original contracts were eventually eliminated by Kobe."

The Court then said (p. 424):

> "Of course, the refusal to grant a license or a willingness to grant one if requested might be a circumstance in determining whether or not there was an unlawful monopoly. It would not be controlling and would not be a defense if an unlawful monopoly actually existed."

In the Seventh Circuit the same principle has been declared in the case of *Congress Building Corp.* v. *Loew's Incorporated,* 246 F. 2d 587 (C. A. 7, 1957), where the Court said (p. 595):

". . . The failure of the plaintiff to demand that defendants refrain from their illegal trade practices could not legalize such trade practices nor immunize defendants against liability to those injured . . . . The defendants had a duty to refrain from acts injurious to others and we know of no rule that states that a demand is necessary in an action to enforce a liability arising from a tortious act . . . . Neither Section 4 of the Clayton Act, nor the terms of any agreement or undertaking by plaintiff with any of the defendants, express or implied, nor the circumstances of this case require a demand as a condition precedent to the maintenance of this action."

Here respondents and the members of the pool were maintaining boycotts and inducing the boycotting of petitioner's products in foreign markets through the restrictions of the pools. To require proof of a demand as a condition precedent to bringing suit as the Court below in effect does is to interpolate into an Act of Congress something not found in the language of its legislative mandate.

III.

THE COURT OF APPEALS' DECISION REVERSING THE INJUNCTION AGAINST THE ACTIVITIES OF ILLEGAL POOLS DESTROYS THE INJUNCTION SANCTIONS OF THE ANTITRUST LAWS.

Having held that no damage was proven the Court of Appeals proceeds to reverse the decree enjoining Hazeltine's participation in the pools on the theory that if no actual damage is proven there can be no threat of damage in the future, even though the pools are shown to have been organized for the express purpose of suppressing petitioner's competition and thus injuring its business.

Hazeltine counsel admitted at the trial that the instant conspiracy if proven would violate the antitrust laws. The

following colloquy between Court and counsel occurred (A. 401):

> "The Court: Is it your position, Mr. Dodds, that a conspiracy to prevent the importation of American radios and television sets is not a violation of the Sherman Act?
>
> "Mr. Dodds: Oh, no, if there is a conspiracy no, I would agree that would be a violation."

It has long been settled law that agreements to restrain commerce between the United States and foreign countries such as are shown by the instant proofs are flagrant violations of the Sherman Act. *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523 (S. D. N. Y., 1945), aff'd. 332 U. S. 319 (1947); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951); *United States* v. *Imperial Chemical Industries* (1951), 100 F. Supp. 504 (S. D. N. Y., 1951), 105 F. Supp. 215, 220-3 (S. D. N. Y., 1952); *United States* v. *General Electric Co.*, 82 F. Supp. 753, 847 (N. J., 1949); *United States* v. *General Electric Co.*, 80 F. Supp. 989, 1014-5 (S. D. N. Y., 1948).

The evils of the type of cartel arrangement proven here were pointed out in the *National Lead* case as follows (63 F. Supp. 513, 523):

> "To have access to the patents of the combination, the stranger must not only have the consent of the member of the combination in whose 'territory' he would operate, but he must adhere to the principles of the combination. The cornerstone of the system was the private regulation of international trade. The suppression of competition was the cement which held the superstructure in place.
>
> "Whether the form of association they created be called a cartel, an international cartel, a patent pool, or 'a technical and commercial cooperation', is of little significance. It is a combination and conspiracy in

restraint of trade; and the restraint is unreasonable. As such it is outlawed by Section 1 of the Sherman Act. . . ."

The Court of Appeals did not disturb the conspiracy findings or the findings with respect to Hazeltine's participation in the foreign patent pools. These findings were not even contested by respondents in the Court of Appeals.

Hazeltine's counsel, Dodds, when cross-examined in January, 1962, stated the following with reference to the Canadian Pool and Hazeltine's continued participation therein (A. 178-9):

"Q. You knew something was going on in the way of an attack by American companies against that pool, didn't you?

A. Yes.

Q. You had known that for a long time?

A. Yes.

Q. *You still stayed in the Pool?*

A. *Most definitely and we intend to continue to stay in the Pool.*"

Hazeltine's new counsel admitted that the Pool in Canada was still operating as late as April, 1965 (A. 3036).

However, because it could find no proof of the fact of damage even though the Trial Court had found that Zenith's foreign commerce had been "drastically curtailed", the Court of Appeals held, as a matter of law, that Zenith was not entitled to injunctive relief. The Court said: "It follows from our conclusion with respect to the foreign patent Pools that injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be illegal conspiracies, cannot be justified under 15 U. S. C. Sec. 26. Paragraph C of the injunction granted must be stricken" (A. 4261-2). In so holding the Court of Appeals has given Section 16 of the Clayton Act an interpretation in conflict with Congressional intent and the

decisions of this Court. Petitioner would have been entitled to injunctive relief even if no injury or damage had been shown. Thus in *Bedford Cut Stone Co.* v. *Journeymen's S. C. Association*, 274 U. S. 37, 54-5 (1927), a private action for injunctive relief under Section 16, this Court held:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears. The Anti-trust Act 'directs itself against that dangerous probability as well as against the completed result'."

See also *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82 (1902).

Here the record conclusively shows that the very existence of the Pools was a continuing threat to Zenith's foreign business. The Pools were organized to stop the competition of American companies. The Pools' portfolio of patents include virtually all of the important patents in the television field, including Hazeltine's color patents. The Pools would not license imports and stated that dealers or users of unlicensed imported sets would be sued for infringement. At the same time Hazeltine refuses to grant a license to export, by implication or otherwise, under its domestic patents to any country where it is a member of a Pool.

That this situation constitutes a threat or a "dangerous probability" of injury is expressly stated in the Canadian Royal Commission Report. This report, introduced in evidence by respondents, states (Pl. Ex. 50A; A. 2811, 2830):

> "The portfolio in respect of which CRPL had the right

to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if any one could sell in Canada a radio or television receiver.

". . . It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission."

The Court of Appeals decision makes no mention of this report.

The decision below assumes that there could be no threat to Zenith's foreign business by presently operating patent Pools short of the Pools bringing infringement suits against Zenith during the damage period in each of the markets involved. The Court reaches this conclusion notwithstanding the facts that the Canadian Pool actually threatened Zenith with suit during the damage period (Def. Ex. 154; A. 2021) and Hazeltine was suing in this proceeding on a patent the counterpart of which was in the Canadian Pool (A. 131, 272).

This holding leaves Zenith's foreign business exposed to ruinous infringement litigation and at the mercy of the Pools' enforcement policy. Zenith's exports to Canada in 1967 under the protection of the District Court's injunction, not stayed pending appeal, amounted to $12,694,000. Total American television and radio exports were $14,538,417. See Appendix B to this brief pp. A-25, A-26. The Court of Appeals decision deprives Zenith of any protection for this business. The decision if allowed to stand will destroy not only Zenith's competition to the Pools, but the competition of all other electronic companies seeking to export to the markets involved, and this at a time when this country desperately needs to preserve its foreign trade in aid of a deficit position in its balance of payments with other countries.

This case involves the activities of the foreign subsidiaries of the largest electronics companies in the world. They include, among others, General Electric, Westinghouse, RCA, the Philips Company of Holland, British General Electric, Electrical and Musical Industries, Standard Telephone and Cables, Telefunken, Marconi Wireless and the Hazeltine companies.

The large public interest involved is shown by proceedings before the Patents, Trademarks and Copyrights Sub-Committee, Committee on the Judiciary, United States Senate Hearings, June 1, 2 and 3, 1965, where Senator Russell B. Long states (p. 331):

> "What is especially intolerable is that U. S. Government funds paid for 90 percent of the research which enabled this Company [Hazeltine] to accumulate its patents. In essence, then, public funds have been used to prevent Americans from exporting their goods. Indications are that this practice is widespread, and the effects on our balance of payments are undoubtedly very serious * * *. International patent pools can also undermine our national safety. They have been used in the past to transmit military information—even to our enemies."

The decision of the Court of Appeals, both in failing to find any evidence of injury or threatened injury on this record, and in requiring proof of actual injury as a condition to injunctive relief, completely nullifies the sanctions of Section 16 of the Clayton Act. A question of the proper construction of Section 16 is involved, charged with tremendous public interest in that it involves the destruction of foreign markets in Canada, England, and Australia for all American electronics companies prepared to compete in those markets.

IV.

THE MISUSE OF PATENTS DEFENSE ASSERTED BY ZENITH WAS CONCLUSIVELY PROVEN ON THIS RECORD.

The Trial Court found a misuse by Hazeltine of its patents (Findings IV, V, VI, VII, VIII, IX, X, XI and XII, A. 2893-98) by attempting to force Zenith to sign a standard package license. Specifically, the Trial Court found that both Hazeltine's 50-80-100% offer with respect to black and white patents in 1959 and its various proposals with respect to color patents in 1962 and 1963 were attempts "by economic coercion to force taking of the package" (A. 2898).

The Court further found (Finding XII, A. 2898):

> "In all of its proposals to Zenith, Hazeltine insisted as an alternative to litigation that Zenith for a period of five years pay royalties in large sums based on its entire production of receivers whether or not any Hazeltine patent was employed in any way in its products. Plaintiff thus insists that royalties be paid on admittedly unpatented apparatus."

While the Court of Appeals agreed that Hazeltine's offers of individual color patents at royalty rates substantially in excess of the annual rate for the package of all patents, color and monochrome, "constituted an illegal attempt to force acceptance of the standard package and a misuse of patents," (A. 4250) it reversed the District Court's finding of misuse with respect to a similar offer for monochrome patents, and modified paragraph B of the decree to permit licensing of individual patents "the sum of which is greater than the package rate" (A. 4252, 4262).

The Court of Appeals also reversed the Trial Court's

finding of misuse based on the collection of royalties on unpatented products. In so doing the Court struck paragraph A of the decree (A. 4262) which enjoined respondents from: "A. Conditioning directly or indirectly the grant of a license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any domestic patent upon the taking of a license under any other patent or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent" (A. 3079). The Court's holding on the latter issue misconstrues this court's decision in *Automatic R. Mfg. Co. v. Hazeltine Research*, 339 U. S. 827 (1950). The Court below reads this decision as permitting a patentee to compel its licensees under threat of infringement suits to pay royalties on their entire production whether or not any patents are used. This is a requirement which appears in any patent license which was available from respondents and, as the District Court found, was an attempt to collect royalties on unpatented products.

Since licensees are estopped to challenge the validity of licensed patents (*United States* v. *Harvey Steel Co.*, 196 U. S. 310 (1905)), Hazeltine by its package licensing policy has been able to keep the validity of hundreds of its patents from scrutiny by the courts and thus preserve the coercive power of the package license.

In a company memorandum dated December 14, 1961, and introduced in evidence without objection, L. B. Dodds, plaintiff's counsel, said:

> "Hazeltine, since its organization in 1924 and until very recently, offered licenses to the industry only under its whole group of patents." (Def. Ex. 3; A. 985, 991)

That Hazeltine would not license its patents except under a package license is further shown by the following documents produced from its files:

"I did not give a negative answer to the question of granting a license under four patents. I distinctly remember saying I would have to consult you on that. I stated we like to stick to our standard if possible but that I would discuss this with you. I remember telling you of this on the phone but it does not appear in my memo of 2 August because I kept that brief partly not to put some things in writing and partly because we had a meeting set up for 8 August, a week later." (Interoffice memo, Shea to Dodds, June 2, 1952, Def. Ex. 4; A. 996-7)

An interoffice memorandum, Shea to Binns, dated March 4, 1949 (Def. Ex. 5; A. 998), states:

"I recommend we study their circuits and if we can make a good enough case for litigation put it up to Dave Schultz that litigation will cost them so much for which they get no return, whereas the difference in cost between $55,000 and litigation gives them good services. From his reaction with Bill Grimditch I believe this is our only possible chance."

An interoffice memo, Dodds to Binns, December 30, 1949 (Def. Ex. 6; A. 1000-1), states:

"Richardson assured me that he was still attempting to get the responsible management personnel together to consider the license from an over-all viewpoint, that is, patent protection, freedom of design, engineering assistance, *and freedom of litigation costs* but that he could, of course, make no promises." (Italics ours)

A letter from Dodds to Jack Binns, dated August 8, 1951 (Def. Ex. 7; A. 1002, 1003-4) states:

"Redfield urged that they be permitted to take a 'sample' of our license for a shorter period than five years to try it out and see if they like it. I said the answer to that was absolutely no. Redfield then asked that we make a proposal to them based only on the patents on which we warned them of infringement, royalties to be based on the use of these patents. I

said that I would do so but that the rates of royalty for such a license would probably be such as to exceed the $50,000 on their volume of business and that the license would necessarily contain some provision to insure against litigation as to the use of the licensed patents. I also said that we disliked that sort of arrangement as being one in which the licensee might be licensed at any given time under one group of patents while we would find it necessary to sue them on other patents, and that such litigation would seriously impair the usefulness of the license. As the discussion progressed, this suggestion pretty well dropped out of the picture."

Zenith, for many years acting under the obvious duress of Hazeltine's threat of litigation, signed Hazeltine's standard package license (Def. Ex. 2; A. 955). In May, 1959, L. B. Dodds, respondents' counsel in this case, again demanded that Zenith sign a package license for a 5-year period at the then package rate of $50,000 a year (A. 434-5). Dodds asserted that Zenith was infringing at least four Hazeltine patents in the manufacture and sale of black and white television receivers (A. 435-6). Dodds said that licenses would be granted for black and white television, excluding color television, in accordance with the following formula:

> Any one patent in the package would be licensed at 50% of the royalty rate for the entire package of over 500 patents and patent applications. Any two patents would be licensed at 80% of the package rate. Any three or more patents would be licensed at 100% of the package rate. Hazeltine reserved the right to sue for infringement of any patent not licensed. All licenses would be subject to the terms and conditions of the standard form and would require payment of royalties on all production during the 5-year term of the license irrespective of whether any patent was employed or not (A. 436-7).

Zenith informed Dodds that none of the four patents asserted was valid or infringed by any Zenith apparatus and Zenith would not sign the Hazeltine package license (A. 435-6).

Hazeltine then served written notice of infringement of two patents on Zenith on October 15, 1959 (Def. Ex. 9, A. 1008), and started the instant suit on November 20, 1959 (A. 1).

During the course of discovery proceedings in this case plaintiff's excutive vice president, Mr. Ruestow, informed Zenith's patent counsel, Frank Crotty, that Zenith was then infringing at least nine Hazeltine color television patents (A. 419-21) and demanded that Zenith sign the standard package license (Form 918, Def. Ex. 2; A. 955). Crotty confirmed this by letter to Ruestow under date of October 25, 1961 (Def. Ex. 10; A. 1010).

Crotty wrote Ruestow under date of November 21, 1961 (Def. Ex. 11; A. 1012), informing him that Zenith had "no need for a license under all of the patents of your portfolio," and asked for terms on the nine patents asserted by Ruestow.

In reply, on April 11, 1962, he received a draft license agreement (Def. Ex. 12; A. 1013) which provided an annual royalty rate of $435,000 for a license restricted to the nine color TV patents and an annual rate of $500,000 for a license under all of Hazeltine's color TV patents (A. 422-3). At the same time Ruestow informed Crotty that Zenith could have a package license covering all of Hazeltine's patents for both color and black and white for $150,000 a year (A. 423).

This was followed by the 1963 proposal to license nine color patents at an annual rate of $275,000, while at the same time offering the package license for all patents, present and future, black and white and color, at an annual

royalty of $200,000 (A. 428-32). Thus over the 5 year license period it would have cost $375,000 more to take a license under the nine color patents than to take a license on all the Hazeltine patents.

Crotty understood Hazeltine's approach to be a threat of litigation unless Zenith succumbed to Hazeltine's license demands (A. 439); indeed, the threat was real and Hazeltine had planned bringing additional infringement litigation against Zenith on color television patents if Zenith failed to accept the standard license agreement (Def. Ex. 36, A. 1141, 1144). It is quite obvious that from a business point of view, the only practical alternative was to accede to Hazeltine's demand and sign the full package license.

However, because the foreign counterparts of the Hazeltine patents were in the foreign pools (A. 131, 272) and the Hazeltine package license was expressly restricted to the United States (Def. Ex. 2; A. 955, 958; Def. Ex. 115; A. 1634) by virtue of the conspiracy, Zenith really had no option but to refuse the package license and defend the present suit.

The Court below affirmed the Trial Court's finding of misuse with respect to Hazeltine's 1962 color proposal, but failed to perceive the misuse inherent in the 50-80-100% black and white proposal where Hazeltine was asserting Zenith was infringing at least four monochrome patents, or in the requirement that Zenith pay royalties on its entire production as a condition to any license. Nor did the Court appreciate the connection between Hazeltine's domestic licensing activities and its participation in foreign pools where the foreign counterpart patents were being used to stop imports. As a result the Court struck or modified the decree provisions designed to prevent this misuse of patents (A. 4261-2).

The Court of Appeals opinion makes no mention of the

fact that Hazeltine patent counsel conceded the misuse inherent in the 50-80-100% formula. Thus Hazeltine's executive vice president and counsel in this case, Mr. Ruestow, in a memorandum (Def. Ex. 23A; A. 1080, 1083) said:

"The Legal Problem (Patent 'Misuse').

"This, simply stated, is that we may not get ourselves in a position where we are forcing a licensee to take a license under all our patents in order to get those he wants. He must be free to make his own selection of those he wants without being blackmailed to recognize others. If we do this, the courts will not enforce our patents until we purge ourselves of this 'misuse of patents'. That can be a very disastrous penalty if we can not purge ourselves quickly, and it conceivably could take us six years to do so.

"This legal problem is by no means new but it has assumed a more threatening nature in view of a recent court decision [*American Securit Co.* v. *Shatterproof Glass Corp.*], wherein a company was held to have misused its patents by telling a licensee he could have all patents or only one but that the rate was the same either way. This decision implies that the rate for one must be proportionately smaller than the rate for all in order to be legal.

"This is precisely the situation with HRI. Zenith wants a license under only a few important patents of their own choosing. We will have to offer them at less than our present royalty rate for all, or run the risk of running afoul of the law and incurring a severe penalty . . ."

He then wrote in a memorandum with reference to the 50-80-100% formula:

"I open possibility of higher income and get misuse off our backs. I must act now. Zenith is forcing me. I must either give them low rates to avoid misuse or raise the package rate." (Ruestow's notes on L. B. Dodds' memo of 12/14/61, p. 1, Def. Ex. 24, A. 1089)

"If I am forced to stick to present agreement Zenith will make me divide 1.35% up among maybe 80 patents, *or if I offer the 50%-80%-100% deal they pick ten patents and zingo we are right back in misuse.*" (Ruestow's notes on L. B. Dodds' memo of 12/14/61, Def. Ex. 24; A. 1089-91)

Again, in his own notes, Ruestow wrote (Def. Ex. 26; A. 1094, 1100):

"It is my firm belief that the new policy I first suggested in my memo of November 20, 1961 to W. H. Wilson has been completely vindicated by the decision of the Supreme Court of the United States, November 5, 1962, in the case of *U. S.* v. *Loew's Incorporated.* I continue in the belief that it would be bad business to risk a challenge of our policies on the issue any longer. The alternative proposal now under discussion does not solve the dilemma any better than that approved last summer . . ."

"So what have we gained for the risk of misuse charge. *The whole thing is still apt to be viewed for just what we intended—a transparent attempt to force them into package.*" (Handwritten notes, E. A. Ruestow, Def. Ex. 27; A. 1109) (Italics ours)

Ruestow was cross-examined on his various memoranda as follows (A. 634-5, 637):

"By Mr. McConnell:

"Q. (Reading) 'I opened the possibility of higher income and get misuse off our backs. I must act now. Zenith is forcing me. I must either give them low rates to avoid misuse or raise the package rates.' Now, as late as December of 1961 Zenith was forcing you, is that right?

"A. That is what I wrote.

"Q. Well, is that—were you just writing fiction there in this memo?

"A. No, I wasn't writing fiction, no.

"Q. All right. So that there was something going

on between you and Zenith as late as December of 1961; will you agree with me on that?

"A. Yes.

"Q. And you said: 'I must either give them low rates to avoid misuse or raise the package rates.' All right, did you do either of those two things?

"A. No."

• • • • •

"Q. And here is your comment on it: 'Still apt to be viewed for just what we intended, a transparent attempt to force them into the package.'

"Q. Now who is the 'we' you refer to?

"A. The [Hazeltine Corporation] group that was working on the problem of drafting a new policy."

In view of these admissions it is difficult to see how the Trial Court could have reached any other conclusion than it did, namely, that Hazeltine was attempting to force Zenith to accept the package license. Even the Court below concedes that if this were the purpose of the 50-80-100% proposal it would constitute a misuse under the holdings in *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *American Securit Co.* v. *Shatterproof Glass Corp.*, 154 F. Supp. 890 (Del., 1957), aff'd 268 F. 2d 769 (C. A. 3, 1959), cert. den. 361 U. S. 902 (1960). In the latter case Judge Leahy held (p. 895):

> "... [T]he policy of plaintiff to grant no license unless it is under all its patents for a fixed royalty, is one of unlawful coercion contrary to public policy as announced by the courts. And, it cannot be said by plaintiff in answer that its practice of group or package licensing was designed merely to suit its business convenience. Convenience to the patent owner can never justify an unlawful use of the patent monopoly. In this field, a reward granted to an inventor is important, only insofar as it serves to release to the public the product of his genius. That service ceases to be rendered when the reward no longer can be found to relate

to the quality of each patent. In such event one patent cannot draw strength from the others and the monopoly of each thus be extended."

The Court of Appeals for the Third Circuit affirmed 263 F. 2d 769, 777, saying:

> "Each monopoly must stand on its own footing. Cf. *United States* v. *Paramount Pictures*, 1948, 334 U. S. 131, 158, 68 S. Ct. 915, 92 L. Ed. 1270. Mandatory package licensing is no more than the exercise of the power created by a particular patent monopoly to condition the licensing of that patent upon the acceptance of another patent but that is too much. The protection, or monopoly, which is given to the first patent stops where the monopoly of the second begins.
>
> "Whatever may be the asserted reason or justification of the patent owner, if he compels a licensee to accept a package of patents or none at all, he employs one patent as a lever to compel the acceptance of a license under another. Equity will not countenance such a result. We conclude that the court below committed no error in finding that the defense of misuse asserted by Shatterproof is a valid one."

Hazeltine's misuse and unlawful attempts to extend its patent monopolies are also clearly evidenced in its demands on Zenith that royalties be paid on Zenith's entire production whether or not any Hazeltine patents are used. The Schedule of License Terms recites "The base to which the stated percentages apply, and all other terms used herein, are as defined in Hazeltine Research, Inc.'s new standard license agreement now being prepared. The Licensor-Licensee relationship will be established only by the execution of that standard agreement" (Def. Ex. 15; A. 1035, 1036). The new Standard License Agreement (Def. Ex. 18; A. 1044, 1047) requires that Licensee "pay to Licensor upon each television receiver manufactured, sold or leased by Licensee royalties . . ."

thereby carrying over the identical requirement (Def. Ex. 2; A. 955, 959) of the old form Standard License Agreement to pay royalties on a class of goods whether licensed patents are used or not. This same obligation was a condition of Hazeltine's 50-80-100% formula (Def. Ex. F-10; A. 2665) and is a flagrant patent misuse under the established principle of the tie-in cases. *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U. S. 661, 666 (1944); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942); *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495 (1942); *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917).

The provision was not just a matter of convenience in computing royalties but was an attempt to collect royalties on unpatented products and to discourage licensees from inventing around the applicable patents during the five-year term, as the Trial Court found (Finding XII; A. 2898). The illegal purpose was admitted by Hazeltine's own documents (Def. Ex. 38; A. 1148-9):

> "... Under the Hazeltine system of applying the royalty percentage to the selling price of the manufacturer's television sets regardless of what Hazeltine patents, *if any*, are used in the particular sets (in accordance with Hazeltine v. Automatic Radio) it would not make any practical difference in Hazeltine's income if he switched to the alternate ... design [that doesn't use the licensed patents]." (Italics ours)

The Court of Appeals has misconstrued the holding of this Court in *Automatic R. Mfg. Co.* v. *Hazeltine Research*, 339 U. S. 827 (1950). In that case the Court held that parties in an arm's length transaction can legally agree to employ any convenient method of fixing royalty rates but the Court was careful to confine its holding to contracts negotiated at arm's length and freely entered into by both parties to the transaction.

Automatic Radio is no sanction for Hazeltine's *demand* that the license relationship will be established "only by the execution of that standard agreement" (Def. Ex. 15; A. 1035-6) requiring payment of royalties on all television receivers made by Zenith, especially since the Schedule of License Terms (Def. Ex. 15; A. 1035-6) permits the selection of one, two or a small number of patents by the licensee but no election with respect to the obligation to pay royalties whether a licensed patent is used or not.

From the above we respectfully submit that Hazeltine at all times knew that it was misusing its patents and with full knowledge of the risks involved, continued its illegal activity up to and long after the instant suit was started. It thus appears from undisputed testimony that there is no defense to the misuse issue and the Court of Appeals decision in so far as it holds respondents have not misused their patents by (a) putting patents into foreign patent pools and restricting its domestic licenses to the United States pursuant to the conspiracy, (b) coercing payment of royalties on unpatented apparatus and (c) using the 50-80-100% formula, should be reversed. For the same reasons the Court's directions to strike and modify the decree provisions on misuse should be reversed.

V.

THE USE OF OFFERS OF PROOF BY THE COURT OF APPEALS AS A BASIS FOR OVERRULING THE TRIAL COURT'S FINDINGS OF FACT SO FAR DEPARTS FROM ACCEPTED TRIAL PROCEDURES AS TO CALL FOR THIS COURT'S SUPERVISION.

In determining that the Trial Court's damage findings were erroneous, the Court of Appeals utilized offers of proof which were never in evidence in the case. These offers of proof arose as follows: On March 29, 1965, the re-

spondents, appearing by new counsel a year after the trial had been concluded and after the Trial Court had entered its findings and conclusions of law against the respondents' contentions, filed a motion to withdraw the Court's findings and grant a new trial (A. 2939-54). In support of the motion respondents filed extensive offers of proof (A. 2956-95). Subsequently, respondents filed further offers of proof following the limited hearing on the issue of government embargoes in England and Australia. See Volume VIII of Appendix (A. 3547-4130).[6]

The motion to retry the case was denied by the Trial Court along with several other post-trial motions, and this order was not disturbed by the Court of Appeals. Nevertheless these offers of proof were continually referred to in respondents' Court of Appeals brief as proof that the Trial Court's findings were clearly erroneous (Hazeltine Brief on Antitrust Issues in Court of Appeals, pp. 58, 94-95, 98, 102-104, 110, 114, 116, 120, 121, 130, 147, 149, 150, 154, 155, 156, 158-160). Over our objection the Court of Appeals obviously considered the offers of proof as evidence in the case because the facts set forth in such offers and not in the record are referred to in the Court's opinion. A few examples will suffice. Thus, the Court says: "nor is there any proof of use by the Australian patent pool of restrictive license forms to prevent import" (A. 4256). This statement comes from respondents' offer to prove such fact (A. 2970-85), and is directly controverted by documentary evidence referred to at pages 88-90 of this brief.

The Court next says, "Actually, high import duties and shipping costs posed a formidable barrier to Zenith's sales" (A. 4256). Again, this statement comes from an offer of proof (See respondents' brief on Antitrust Issues

6. The offers of proof were included in the Appendix pursuant to respondents' counter-designation.

in Court of Appeals, pp. 115-6, 152-5) and is contradicted by Kaplan's testimony (A. 530).

The Court says, "Significant barriers other than patent difficulties operated to prevent sale of Zenith TV receivers in England. . . . Zenith's sets sold in England would be in competition with substantially lower priced British sets" (A. 4257). This contention was made by respondents in the Court below substantially on the basis of post trial offers of proof (See Ib. pp. 102-4, 158-62).

It is impossible to determine the extent to which the Court of Appeals relied on offers of proof and how its deliberations might have been affected by matters not in evidence. It is clear, however, that Rule 52(a) does not contemplate use of offers of proof to overturn a trial court's findings of fact as "clearly erroneous".

This Court in *Continental Ore*, 370 U. S. 690 (1962) said (p. 696) "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Obviously, a reviewing court can not comply with this rule by weighing the respondents' offers of proof against the record evidence.

VI.

THE DISMISSAL FROM THE SUIT OF HAZELTINE CORPORATION IS NOT JUSTIFIED BY THIS RECORD.

At a pretrial conference on April 3, 1963, in the presence of the Trial Judge, all counsel agreed to a stipulation whereby Hazeltine Research, Inc. and Hazeltine Corporation would be regarded as one entity for the purposes of this litigation (A. 55).

The stipulation was signed by L. B. Dodds, chief trial counsel for Hazeltine who, in an affidavit filed on May 10, 1963, stated (A. 50):

"He has been retained by or employed by Plaintiff's parent Company, Hazeltine Corporation, continuously since 1934 and has been a Vice President of said Hazeltine Corporation continuously since 1939 (except for a period during 1944-45 when he had no connection with Hazeltine Corporation or any of its affiliates). He also was an officer of Plaintiff Hazeltine Research, Inc. from its organization in 1946 until June 7, 1961. Since 1946 he has been continuously familiar with the patents and the patent licenses of both Plaintiff and its parent Hazeltine Corporation."

At the trial of the antitrust counterclaim Dodds testified (A. 774):

"That is correct. There is a stipulation on the record that solely for the purposes of this action the plaintiff Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

No one from the parent, Hazeltine Corporation, denied Dodds' authority to make the stipulation during the trial or at any time subsequent thereto. Ruestow, who was General Patent Counsel for the Hazeltine Corporation (A. 278), and Westermann, who was Vice President and General Counsel of Hazeltine Corporation (A. 571), and both of whom were present during the trial and thoroughly familiar with the stipulation, never said one single word in repudiation thereof.

However, after the District Court entered its findings, Hazeltine Corporation hired new counsel who appeared on its behalf and for the first time contended that the entry of judgment would deny it due process of law. The only support offered for this contention was Dodds' *ex parte* affidavit that he "neither intended nor had any authority to bind Hazeltine Corporation" (A. 3008, 3009-12). No officer or director of Hazeltine Corporation denied knowledge of the stipulation or Dodds' authority to make it by testimony, affidavit or otherwise. Dodds was not even present in

Court when his affidavit was tendered so that he could be examined thereon by the Court and counsel for petitioner. The Trial Judge, however, had personal knowledge of the proceedings and representations at the April 3 pretrial conference which led to the stipulation. The District Court after a hearing on Hazeltine's contention that it was not a party (A. 3019-30; 3042-7) found against it and entered a joint and several judgment against both parent and subsidiary (A. 3078).

The Court of Appeals reversed the judgment against Hazeltine Corporation without remand on the ground that "the corporation's appearance to argue the issue after the trial was not sufficient opportunity to be heard under the due process clause" (A. 4242). What is overlooked is that Hazeltine Corporation appeared in the case by its own counsel before any judgment was entered and submitted the question of the Court's jurisdiction over it as a question of fact to be determined by the District Court on the record. No motion was made to open the case in order to put in evidence of any lack of authority of Dodds to sign the stipulation.

The question of whether Dodds had authority from the parent corporation to execute the trial stipulation was put at rest by the following affidavits:

In an affidavit dated May 31, 1961, Mr. Dodds stated (A. 32):

> "1. He is now and has been since the organization of Plaintiff in 1946 an officer of that Company and is now and has been since 1939 (except for an absence during part of 1944 and 1945) an officer of Plaintiff's parent Hazeltine Corporation."

In another affidavit dated May 10, 1963, Mr. Dodds stated (A. 50):

> "2. He has been retained by or employed by Plaintiff's parent Company, Hazeltine Corporation, continuously since 1934 and has been a Vice President of

said Hazeltine Corporation continuously since 1939 (except for a period during 1944-45 when he had no connection with Hazeltine Corporation or any of its affiliates). He also was an officer of Plaintiff, Hazeltine Research, Inc., from its organization in 1946 until June 7, 1961. Since 1946 he has been continuously familiar with the patents and patent licenses of both Plaintiff and its parent Hazeltine Corporation."

This affidavit was annexed to a Hazeltine memorandum in support of a motion, filed May 15, 1963, to strike the antitrust defense raised in paragraph 13 of Zenith's Answer. In the memorandum, counsel for Hazeltine stated (A. 54):

> "For the purposes of discussion, Plaintiff finds it unnecessary to rely on the fact that it is a corporate legal entity separate and distinct from its parent Hazeltine Corporation, *and is willing that the two Companies be considered as a single entity insofar as their respective foreign and domestic licensing operations are concerned.*" (Italics ours)

In his opening statement at the trial, Mr. McConnell, counsel for Zenith, took particular pains at the outset to remind the Court that Hazeltine Corporation and its subsidiary, Hazeltine Research, Inc., were one and the same company in this litigation. As shown by the record (A. 114), Mr. McConnell stated:

> "As I say, the instant cross-claim alleges a conspiracy between the Hazeltine Corporation, and we have a stipulation in the record that the Hazeltine Corporation and its subsidiary companies are to be considered as one company in these proceedings. So we don't have to bother with whether it is the Hazeltine Research Corporation or the Hazeltine Corporation. There are three companies, I believe, and all of them are involved here under our arrangement with counsel, Mr. Dodds, that they are to be considered as one company."

Mr. Dodds, Hazeltine counsel, not only took no exception to this statement, but obviously relied on the stipulated

fact himself throughout his entire opening statement. For example, he told the Court:

> "What *we* at Hazeltine have done have effectively sold its personal property to these pools. . . . The point is that what *we* are doing is selling these chattels, you might say, to these foreign pools which operate consistently with their laws." (A. 131) (Italics ours)
>
> • • • • •
>
> ". . . the Canadian law is to foster Canadian business, and they have many facets of Canadian law favoring Canadian business and to prevent aggrandisement of their market by their big neighbor to the south. We say that maybe we don't like it, but that is the law in Canada and there isn't anything that *we* can do to fix it." (A. 134). (Italics ours)

Again fully relying on the stipulated fact that parent and subsidiary were one company in the litigation, Mr. McConnell, Zenith's counsel, stated immediately after the opening statements (A. 141):

> "May it please the Court, I want to open this case by reading certain portions of a deposition which was taken by me, and the witness was Mr. Laurence B. Dodds. He was a vice president of the Hazeltine Company. Under the applicable rules, the Federal Rules, we can use his deposition, portions of it, read into the record their admissions.
>
> "The Court: Admissions against interest?
>
> "Mr. McConnell: Yes [THE COURT:] all right. Which corporation is he the vice president of? Both of them, or all three of them?
>
> "Mr. McConnell: Hazeltine Corporation.
>
> "Mr. Dodds: Hazeltine Corporation."

Pertinent portions of the deposition were then read into the trial record in accordance with Rule 26(d)(2) which provides in pertinent part:

> "(d) USE OF DEPOSITIONS. At the trial . . . any part or all of a deposition, so far as admissible under the

rules of evidence, may be used *against any party* who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * * * * *

"(2) The deposition *of a party* or of any one who at the time of taking the deposition was an officer, *director*, or managing agent of a . . . *private corporation*, . . . *which is a party* may be used by an adverse party for any purpose." (Italics ours)

Mr. Dodds was present in court and raised no objection; *Hazeltine, parent and subsidiary, as one entity under the stipulation, was a party and, without objection, the deposition of Dodds as an officer of the parent, Hazeltine Corporation, was properly read into the record as admissions against interest.* The Court and all counsel for Hazeltine, as well as Zenith, clearly recognized this. When Mr. Dodds took the stand later at the trial as the chief Hazeltine witness on all aspects of the antitrust phase of the litigation, he testified under oath as follows (A. 774):

By Mr. Diggins [Counsel for plaintiff]:

"Q. So that there was about a five or six-year period from '55 to '60, where you were responsible for licensing in both companies?

A. That is correct.

Q. Both United States and foreign?

A. That is right.

Q. Now, just so that we will understand each other, throughout this examination, except where it becomes important, in referring to Hazeltine we understand that it includes the Hazeltine companies generally.

A. That is correct. There is a stipulation on the record that solely for the purposes of this action the plaintiff Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

Consistent with the stipulation, the record and the understanding of the Court and all counsel, following the trial

Hazeltine submitted the following proposed finding of fact (A. 2913, 2914):

"Jurisdiction and Parties

* * * * *

"8. It is stipulated that, for the purposes of this Action, Hazeltine and H. C. may be considered a single legal entity to avoid the issue of whether or not it is appropriate to 'pierce the corporate veil', but it is proper to consider the separate and unrelated activities of the two companies separately."

Hazeltine thus at the post-trial stage of the case again openly represented to the Court that the purpose of the stipulation was to "pierce the corporate veil," and that therefore there was no question about the fact that Hazeltine Research, Inc. was the *alter ego* of Hazeltine Corporation. Hazeltine counsel further, on the basis of the proposed finding No. 8 quoted above, sought to have the trial court enter findings of fact and conclusions of law in favor of the Hazeltine Corporation on practically every issue in the case. See for example proposed findings Nos. 29, 30, 31, 32, 42, 47, 49(a), (b) and (c), 50, 51, 53, 55, 56, 57, 58, 60, 63, 64, 65, 66, 67, 68, 71, 82, 83 and 87, and proposed conclusions of law Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 (A. 2922-38).

In proposed finding of fact No. 82, Hazeltine asked the Court to find that (A. 2933):

"Neither Hazeltine nor H. C. [Hazeltine Corporation] has participated in any general plan or conspiracy the purpose and effect of which have been to restrain the export of radio and television receivers from the United States."

And in finding No. 87, the Court was asked by Hazeltine to hold (A. 2935):

"There is no evidence linking Hazeltine or H. C. [Hazeltine Corporation] with members of the alleged 'international conspiracy'."

And, in Hazeltine's proposed conclusion of law No. 9, it asked the Court to rule that (A. 2937):

> "The bilateral agreement between H. C. [Hazeltine Corporation] and CRPL currently in force is a lawful agreement, the primary purpose and effect of which is to enable H. C. [Hazeltine Corporation] to obtain a fair royalty return under its Canadian patents."

And in proposed conclusion of law No. 10, the Court was urged to find that (A. 2937):

> "The bilateral agreement between H. C. [Hazeltine Corporation] and CRPL currently in force does not constitute a contract, arrangement, plan, or conspiracy in restraint of trade between the United States and Canada."

After the Court refused to adopt Hazeltine's proposed findings, and entered findings against Hazeltine's contentions, Hazeltine employed new counsel who attempted to persuade the Trial Court, and did persuade the Court of Appeals that the stipulation that former Hazeltine counsel had so accurately described in their proposed finding No. 8 did not mean what it said but rather had been entered into for some obscure procedural reason having to do with pre-trial discovery which took place over a year before the stipulation was signed (A. 3008, 3009-12, 3019-30, 3042-47).

Hazeltine's new counsel asserted this contention in a petition for mandamus contending that the Trial Court had no power to enter a judgment against Hazeltine Corporation. The petition was denied on April 7, 1965 (A. 6). Thereafter, Hazeltine Corporation filed identical motions under Rule 15(f) of the Seventh Circuit's Rules to vacate the April 5 and December 13, 1965 judgments as to it, again based on the same asserted lack of jurisdiction of its person (A. 8). By orders of the Court of Appeals dated August 16, 1965 and December 13, 1966 these motions were

taken with the case and granted by the Court's Judgment dated December 13, 1967 (A. 4236).

In the District Court the Hazeltine appearance was labeled a "special appearance" (A. 3008) but the Federal Rules of Civil Procedure make no provision for a special appearance and whether or not the Court views the appearance as "special" or "general", there can be no question but what Hazeltine Corporation submitted the factual issue of whether it was bound as a party under the circumstances of this case for determination by the Trial Court. It filed a brief in support of its "special appearance" opposing entry of judgment against it (A. 3019-30) and orally argued its position (A. 3042-7). Since Hazeltine Corporation submitted the issue of jurisdiction of its person to the District Court and this issue was determined against it prior to entry of judgment there obviously was no constitutional question as erroneously found by the Court of Appeals (A. 4242). It obtained the very hearing it requested on the construction of the stipulation and Dodds' authority to execute it, but the District Court found against it on the entire record, including its personal knowledge of what transpired at the April 3 Pretrial Conference. Accordingly, the only issue in the court below was whether there was substantial evidence to support the Trial Court's determination that in the circumstances Hazeltine Corporation was a party.

The District Court could properly disregard the fiction of separate corporate entity where, as here, the record shows that Hazeltine Research, Inc. was merely the *alter ego* of its parent Hazeltine Corporation. Such determination presents no constitutional problem. *Chicago, M. & St. P. R. Co.* v. *Minneapolis C & C Asso.*, 247 U. S. 490, 500-501 (1918); *Sisco-Hamilton Co.* v. *Lennon*, 240 F. 2d 68, 69 (C. A. 7, 1957); *Allied Chemical Corporation* v. *Randall*, 321 F. 2d 320, 323 (C. A. 7, 1963); Powell, *Parent and Subsidiary Corporations* (1931), Chapters I, V.

In the *Chicago, M. & St. P. R. Co.* case, this Court described the limitation of the doctrine of corporate entity in a parent-subsidiary situation as follows (pp. 500-1):

> "Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two. . . .
>
> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 273, 55 L. Ed. 458, 463, 31 Sup. Ct. Rep. 387, and *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct. Rep. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

The Court below has frequently found occasion to "pierce the corporate veil" even in the absence of such conclusive proofs of *alter ego* as are involved in this case. For example, in *Sisco-Hamilton Co.* v. *Lennon*, 240 F. 2d 68, 69 (C. A. 7, 1957), the Court said:

> "The record demonstrates existence of four cognate corporations all geared to the activities of one another under the parent's control. Under this intimate relationship it would be unjust to fall back on sterile technicalities consisting only of identities of entities

as the sole bar to recovery for negligence by one or more of the subsidiaries. *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Ass'n*, 1918, 247 U. S. 490, 38 S. Ct. 553, 62 L. Ed. 1229; *Davis* v. *Alexander*, 269 U. S. 114, 46 S. Ct. 34, 70 L. Ed. 186; *Garden City Co.* v. *Burden*, 10 Cir., 1951, 186 F. 2d 651. The appeal presents a striking illustration of subsidiaries actively implementing each other in rendering services to the plaintiff. This parent corporation cannot sit back on its charter and avoid tort responsibility for its delinquent child."

And in *Allied Chemical Corporation* v. *Randall*, 321 F. 2d 320, 323 (C. A. 7, 1963) the lower Court held:

> "The circumstances of this case require that the corporate entities of Gilbert's corporations be disregarded, for they did not exist apart from Gilbert's will. The corporations were treated as different parts of one operation. To recognize the corporate entities when in fact they were but the alter ego of Gilbert would promote injustice."

It was contended in the Court below that Hazeltine Corporation could not possibly be bound by the stipulation because it was signed by L. B. Dodds, plaintiff's counsel, not in his capacity as vice president of Hazeltine Corporation but only as counsel for the subsidiary (Hazeltine Rule 15(f) Brief pp. 19-20). This begs the question. The fact of the subserviency of the subsidiary can be established just as conclusively by the admissions of the dominated subsidiary:

> "Direct proof of this affirmative subserviency of the subsidiary officers is conclusive of the case against the parent corporation, insofar as the Instrumentality Rule is concerned. But such direct proof is not often forthcoming." Powell, *Parent and Subsidiary Corporations*, p. 18.

Further as Hazeltine in its own proposed finding No. 8 clearly stated, the stipulated fact that the two companies

were to be treated as one in this case was made in order "to avoid the issue of whether or not it is appropriate to 'pierce the corporate veil,' . . ." (A. 2913-14). This was as much to Hazeltine Corporation's advantage as to Zenith's because Hazeltine expected to obtain a favorable determination with respect to its participation in foreign pools and asked for findings in its favor on all the antitrust issues. Certainly, under the circumstances of this case, parent and subsidiary as one entity was bound by the stipulation. *Fisser* v. *International Bank*, 282 F. 2d 231, 233-5 (C. A. 2, 1960); *Weisser* v. *Mursam Shoe Corporation*, 127 F. 2d 344 (C. A. 2, 1942); *Chilean Nitrate Sales Corp.* v. *The Nortuna*, 128 F. Supp. 938, 941 (S. D. N. Y., 1955); *Shamrock Oil and Gas Co.* v. *Ethridge*, 159 F. Supp. 693 (Colo., 1958).

We submit that Hazeltine Corporation, the parent company, was a party properly bound by the judgments and that its dismissal was error and should be reversed.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below, to the extent it vacated and reversed the judgments of the District Court, should be reversed.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

HAZELTINE RESEARCH, INC.,
Plaintiff,
vs.
ZENITH RADIO CORPORATION,
Defendant.

No. 59 C 1847.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE ANTITRUST ISSUES RAISED IN THE ANSWER AND COUNTERCLAIM.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the court hereby makes the following findings of fact and conclusions of law:

I. The antitrust issues raised in the answer to this patent infringement suit and in the counterclaim for damages and injunctive relief were separately tried following the trial of the patent issues. Defendant in its answer (A. 16-19) asserted the affirmative defense that plaintiff was misusing its patents, including the patent in suit, in violation of public policy and the Sherman Act (15 U. S. C. §§ 1 and 2) and that it, therefore, came into this court with unclean hands and is therefore barred from receiving any relief in this action. Defendant also filed a counterclaim (A. 64) for damages and injunctive relief pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2)

and Sections 4 and 16 of the Clayton Act (15 U. S. C. §§ 15, 26).

II. Defendant-Counterclaimant, Zenith Radio Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 6001 W. Dickens Avenue, Chicago, Illinois (A. 70), and is now and has been continuously for more than 43 years last past engaged in the development for sale and use and in the manufacture, sale and use of radio apparatus and receiving sets, and since the advent of television, television receiving sets throughout the United States and in foreign commerce, and during said period has built up a large volume of business in manufacturing and selling as the demand therefor has existed and will continue to exist, and in the shipment and sale of such apparatus in commerce between the various states of the United States and in foreign commerce, and said counterclaimant is now and has been engaged in said commerce during all of the period above stated and during all times material to this counterclaim (A. 450-456).

III. Counterdefendant, Hazeltine Research, Inc., the party plaintiff in this suit, is an Illinois corporation owned and operated as a wholly owned subsidiary of Hazeltine Corporation, a New York corporation, engaged in the manufacture and sale of electronic equipment and devices (A. 70, 937-951). The parties stipulated (A. 55, 774) that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries (Def. Ex. 32, A. 1127-1130). The gross income of the Hazeltine enterprises approximates $47,000,000 per year (Def. Ex. 1, A. 951).

IV. For many years plaintiff has accumulated a large number of patents, domestic and foreign, for use in its patent licensing business in the electronics industry (Def. Ex. 1, 32, A. 947, 1127-1130). At the time of the filing of this suit Hazeltine had over five hundred patents and patent applications in its licensing portfolio (A. 271).

V. Plaintiff's policy in licensing electronics manufacturers in the United States was to grant a so-called standard package license (Def. Ex. 2, A. 955) which conferred on the licensees for a five-year period fredom from any charge of infringement under all present as well as future Hazeltine patents issuing during the term of the agreement (Def. Ex.'s 2, 3, A. 955, 957, 991). Royalties were required to be paid on the licensee's entire production whether its products employed any or none of the Hazeltine patents (Def. Ex. 2, Art. III, A. 959, Def. Ex. 38, A. 1148-1149). The license was in effect a covenant not to sue the licensee or its customers should Hazeltine decide within the license period that the manufacture and sale of any particular apparatus infringed upon any of its patent rights (A. 605; Def. Ex. 27, A. 1110b).

VI. Hazeltine filed numerous patent infringement suits against manufacturers who refused to sign its license agreement (Def. Ex. 32, A. 1127-1130).

VII. Prior to the instant controversy, Zenith had the standard Hazeltine package license and in May of 1959, toward the close of the last five-year license period, Hazeltine requested that the license be renewed for another five-year period at the then package rate of $50,000 per year (A. 434). Zenith refused, contending that it did not require a license under any of the patents in the package and Hazeltine countered by asserting that Zenith was infringing at least four of the Hazeltine patents in the manufacture and sale of monochrome television receivers (A. 435, Def. Ex. 28, A. 1111-1112) (at that time Zenith was

not manufacturing color receivers (A. 436). At the same time Hazeltine made an alternative proposal to Zenith, offering to grant a monochrome license in accordance with the following formula:

> Any one patent in the package would be licensed at 50% of the royalty rate for the entire package of over 500 patents and patent applications. Any two patents would be licensed at 80% of the package rate. Any three or more patents would be licensed at 100% of the package rate (A. 436-437). Hazeltine reserved the right to sue for infringement of any patent not licensed. All licenses would otherwise be subject to all the terms and conditions of the standard package form of license (Def. Ex. F-10, A. 2665) and would require payment of royalties on all production during the five-year term of the license irrespective of whether any patent was employed or not (Def. Ex. 2, A. 959, A. 437). The license would not cover color television receivers (Def. Ex. F-10, A. 2665, 437).

Zenith refused to sign either of the proposed agreements and on November 20, 1959 the instant suit was filed.

VIII. With the suit on file and at issue, Hazeltine continued its attempt to persuade Zenith to sign the package license. During the course of discovery proceedings Hazeltine informed Zenith that in addition to the patent in suit, Zenith was infringing at least 9 designated Hazeltine patents and applications in the manufacture and sale of its color television receivers (A. 281, 419-420). The old form of standard package license under all the Hazeltine patents was again tendered to Zenith for signature and Zenith again refused to sign it (Def. Ex. 10, A. 1010, 420).

IX. On April 11, 1962, Hazeltine submitted to Zenith a license proposal for color television which provided an annual royalty rate of $435,000 merely for the 9 patents asserted and an annual rate of $500,000 for a license under all of Hazeltine's patents and patent applications

for color television (Def. Ex. 12, A. 1013, 422, 423). However, if the standard package license covering all of Hazeltine's patents, for monochrome as well as color, were signed, the maximum royalty rate would be $150,000, the same as the rate in the Hazeltine-RCA package license (later raised to $200,000) (A. 423-425, 287). Zenith refused these proposals on the grounds that they were obviously designed to force Zenith to take the package license which it did not want or need (A. 426-427, Def. Ex. 13, A. 1032); that Zenith could not place itself at a competitive disadvantage by taking a license under only 9 patents at $435,000 a year rather than signing the package license containing all Hazeltine patents at the package rate of $150,000 per year (A. 426).

X. Hazeltine continued its efforts to persuade Zenith to sign the standard package license before this case could be brought to trial (A. 427-428). In March 1963, as the case approached the final pre-trial conference, Hazeltine made the following proposal to Zenith (Def. Ex. 15, A. 1035):

> It grouped together the nine patents and one application which were claimed by Hazeltine to be employed in the manufacture of Zenith color receivers (A. 1036). It placed a maximum royalty on this package of $275,000 per year but for color receivers only (¶ III (A), A. 1037, 430). For the entire package containing all of Hazeltine's then existing patents for color television an annual maximum of $300,000 (¶ III(B), A. 1037, 430) was set and for all present as well as future patents issued during the license period an annual maximum of $310,000 was demanded for color television alone (¶ III(C), A. 1037, 430).
>
> In this same license proposal, Hazeltine offered its entire package of present and future patents, unspecified, for both monochrome as well as color receivers for an annual maximum of $200,000 (¶ IV(A), A. 1038, 431, 591-592).

Under this proposal, a license could be taken, if desired, under only two of the ten patents asserted against Zenith's color receiver but it would bear an annual maximum royalty in excess of $200,000 and would license only color receiver production (A. 602), whereas the entire package of over 500 patents and applications for both monochrome as well as color receivers would bear an annual maximum of $200,000 (¶ IV(A), A. 1038). This proposal was obviously designed to persuade Zenith to sign the standard package license agreement (Def. Ex's 27, 30, 34-B, A. 1109-1110b, 1121-1123, 1139) which it was unwilling to do and presented to Zenith management the following alternatives:

1. Endure trials and possibly appeals on at least nine patents at a total estimated cost of over one million dollars, plus damages in the event any or all of the suits were lost.
2. Take a license under the package of ten patents and applications at a cost of $275,000 per year for color television (¶ III (a), A. 1037), or a license under the entire package of existing Hazeltine patents for color television at a cost of $300,000 per year (¶ III (B), A. 1037), or at a cost of $310,000 per year a license covering existing and future patents of Hazeltine for color television (¶ III (C), A. 1037) for a five-year period. In each case Zenith would be obliged to make the royalty payment whether any of the patents licensed was used or not in Zenith's color receiver (Def. Ex. 18, Art. III, A. 1047). This would still leave Zenith's entire monochrome production open to continuous attack by Hazeltine, and plaintiff's counsel had already claimed that Zenith's monochrome receiver infringed at least three patents in addition to the patent in suit (Def. Ex. 28; A. 1112, 435).
3. Take a license for color television under two patents selected from the package of ten and pay over $200,000 per year (A. 602), but this would expose Zenith's color production to the assertion of any

or all of the color patents not licensed and would subject its entire monochrome production to the assertion of any of the hundreds of patents in the Hazeltine package.

4. Take the standard package license under all patents and patent applications of Hazeltine, present and future, for both monochrome and color television at an annual maximum of $200,000, per year (Def. Ex. 15, ¶ IV (A), A. 1038, 431, 601-2).

Over a five-year license period it would cost $500,000 to $550,000 more for a license under the small group of ten patents for color television alone than for the entire Hazeltine package covering over 500 patents and applications for monochrome as well as color television. In addition, the full package license would remove the risks of further protracted and expensive litigation or harassment (A. 605), whereas the more expensive license under less than the entire package would leave Zenith and its customers exposed to renewed charges of infringement based on any or all of the remaining hundreds of existing Hazeltine patents as well as all patents issuing during the term of the license (Def. Ex. 7, A. 1002-1004). The only practical answer would be to accede to Hazeltine's demand and accept a full package license.

XI. Plaintiff's offer to license any one of its hundreds of patents for monochrome at 50% of the package rate, any two at 80% of that rate and any three or more at the full package rate was an attempt by economic coercion to force the taking of the package (A. 635, Def. Ex. 24, A. 1091). This is clear from the fact that plaintiff had asserted that Zenith was infringing at least 4 patents in its monochrome receivers (A. 435, Def. Ex. 28, A. 1111-1112). Moreover, the reward demanded by plaintiff for a license under less than the full package of patents is in no way related to the quality of the patents since the price

is determined solely by the number of patents chosen (Def. Ex. 37, A. 1110a, 436-437, 635-636) and most of the patents in the package are characterized by Hazeltine itself as "insignificant". (Def. Ex. 22, A. 1072, 602-603, 641).

XII. In all of its proposals to Zenith, Hazeltine insisted as an alternative to litigation that Zenith for a period of five years pay royalties in large sums based on its entire production of receivers whether or not any Hazeltine patent was employed in any way in its products. Plaintiff thus insists that royalties be paid on admittedly unpatented apparatus. (Def. Ex. 2, Art. III, Ex. 18, Art. III, A. 959, 1047, 437).

XIII. As of the date the trial began Defendant had been injured in its business and property as the proximate result of the acts and demands of Hazeltine, referred to above, in the amount of $50,065 (A. 550-554). Defendant has been forced to make expenditures of money and to use the time of its officers, employees, and counsel to defend against this patent infringement suit, and by virtue of Hazeltine's threats of suits on other patents, defendant has been forced to expend substantial amounts of money to investigate the scope and validity of the patents asserted (A. 551). The injury to Zenith's business was occasioned by the necessity that defendant make a choice among alternatives each of which had an adverse economic effect on its business. It was forced either to cease manufacturing and selling its television receivers, pay tribute with consequent increase in its costs or incur the expenses incident to the defense of protracted patent litigation. Although defendant's choice determined the nature and amount of the resulting damages, it was the necessity of having to choose that occasioned the injury.

XIV. In its counterclaim (A. 64-69) Zenith also seeks damages and injunctive relief based on plaintiff's conspira-

torial activities with foreign cartels or patent pools in England, Canada and Australia which have curtailed Zenith's export business.

The British Patent Pool.

XV. The dominant radio and electronics companies in Great Britain (A. 90-91, 97-100) set up the British Pool into which flow thousands of patents owned or controlled by the members and those affiliated with them in the plan. Among these companies are Electric & Musical Industries Ltd., General Electric Company, Ltd., Marconi's Wireless Telegraph Co. Ltd., Philips Electrical Ltd. (A. 1194, 1205, 1248, 1271, 1272), Pye Ltd. (A. 1243), Murphy Radio Ltd. (A. 1228), Rank Cintel Ltd. (A. 1248), Standard Telephone & Cables Ltd. (A. 1223), Gramophone Co. Ltd. (A. 1205), E. K. Cole Ltd. (A. 1233) and Cossor Ltd. (A. 1237). The Hazeltine inventions and patents have been funneled into the Pool pursuant to an agreement with General Electric Co. Ltd. (Def. Ex.'s 42-50, A. 1165-1190) and the share of the Pool's income allocated to these patents is split between General Electric Co. Ltd. and Hazeltine (A. 207, 320-321, 331-332, Def. Ex.'s 42, 78B, A. 1165-1190, 1441). Pursuant to this arrangement British inventions controlled by General Electric Co. Ltd. are licensed to Hazeltine for exclusive licensing use in its American territory (Def. Ex.'s 38-B, 42, A. 1155-1157, 1165-6) and are included in its United States package licensing activities (A. 639, 1156-1157). The Hazeltine-General Electric Co. Ltd. exclusive agreements were specifically devised to get the Hazeltine patents into the British Patent Pool in a manner which would provide for G. E. C. maximum bargaining power vis-a-vis the other Pool members on the devision of the Pool income (Def. Ex.'s 42, 96, A. 1165, 1504-1505).

XVI. Pursuant to these arrangements, General Electric Co. Ltd. on its own behalf and on behalf of Hazeltine

entered into successive pooling arrangements (Def. Ex.'s 51-60, A. 1194-1272) with the other members of the British Pool wherein and whereby it was agreed that the Hazeltine patents along with the patents of all of the Pool members be licensed in the territory of Great Britain solely by the Pool (A. 1196-1197, 1221, 1267) and on terms and conditions determined by the members of the Pool (A. 1197-1198, 1215-1216, 1262). Each of the participating parties in all of the interrelated agreements, including Hazeltine by virtue of the exclusivity of its joint arrangements with General Electric Co. Ltd., contractually pledged that during the period of the agreements no license would be issued that would permit the export of radio and television receivers from the United States into the British market (A. 1199, 1212, 1258) and that the only license employed by the Pool would be a standard package license limited to local manufacture (Def. Ex.'s 61 ¶ 2l, 62 ¶ 4b, 63 ¶ 4b, 65 ¶ 4a, 66 ¶ 4a, 67 ¶ 4a, 68 ¶ 4a, 69 ¶ 4a, 70 ¶ 2a, 71 ¶ 2a, A. 1280, 1292, 1310, 1325, 1337, 1348, 1360, 1372, 1382, 1393-1394). Hazeltine has been participating in this plan and arrangement since 1938 (Def. Ex. 42, A. 1165), is currently participating in it (Def. Ex. 50, A. 1190, 369, 3036) and intends (A. 179) to continue its participation.

XVII. Hazeltine has had full knowledge of the various interrelated agreements under which the Pool operates and has operated (A. 194, 200, 206, 209-213, 215-216, 316, 367-368) and the purpose and effect of the plan which is to protect the British manufacturers in the Pool against competition from television receivers made in the United States and other countries (Def. Ex.'s 91, 92, 94, A. 1487, 1492, 1500). Hazeltine contends that it has entered into these arrangements because in that manner it can obtain more income from its English patent properties than it could through ts own individual effort (A. 130, 331, 900, 408-409).

XVIII. The Pool has always issued one form of license which, like the Hazeltine package license in the United States, covers all of the patents in the pool (Def. Ex's 38-B, 62, 63, 65, 66, 67, 68, 69, 70, 71, A. 1157, 1290, 1308, 1324, 1335, 1346, 1358, 1370, 1382, 1393-1394) requires payment of royalties on all of the licensees' production whether or not any of the patents are employed (Def. Ex's 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, A. 1279, 1293-1294, 1311, 1325-1326, 1337-1338, 1348-1349, 1360-1361, 1372-1373, 1384, 1395-1396). The effect of this plan is to amass all of the patents for assertion against anyone not licensed, to prevent importers or foreign manufacturers from entering the market and to preclude the possibility of any attack by the licensees on the validity of any one patent (Def. Ex's 65, 66, 67, 68, 69, 70, 71, 91, A. 1328, 1341, 1352, 1364, 1376, 1387, 1398-1399, 1487-1488).

XIX. The policy of the Pool was early stated to be to cooperate in the division of territories provided by the plan and "not knowingly [to] assist any [American] company to sell in England under the protection" of the Pool patents apparatus manufactured in the United States and not licensed under the patents of the Pool's American participants (Def. Ex. 94, A. 1500, Def. Ex's 100, 111, A. 1513-1514, 1557). RCA and General Electric, like Hazeltine, for many years participated in the British Pool (Def. Ex's 51, 72, 92, A. 1194, 1402-3, 1490). However, as the result of anti-trust litigation brought by Zenith and by the Government RCA and General Electric were forced to cease their participation in the plan (A. 450-455, Def. Ex. 114, A. 1607, Pl. Ex. 45, A. 2767).

XX. Initially the strength of the Pool was drawn from patents on radio receivers and with the advent of television, the power of the Pool became greater than ever. Color television is the most recent innovation in the home entertainment field and Hazeltine has now become an even

more important factor in the British combination because of its color television patents which Hazeltine contends has given it a "dominating position" in the color television field (Def. Ex's 1, 32, 76-B A. 946, 1127, 1431).

XXI. For years Zenith made every effort to export home receivers to distributors and dealers in the English market. On each occasion, however, the Pool threatened its distributors until they ceased buying Zenith products and no substantial trade outlets could be found which would risk handling the line since the Pool would not license the sale of imported merchandise (A. 462-464, 473-474, Def. Ex's 100-109, A. 1512-1545).

XXII. As a part of the settlement of antitrust litigation brought against RCA, General Electric and Western Electric, Zenith was in 1957 granted royalty-free world-wide rights under the inventions and patents of these companies (Def. Ex. 114, A. 1607-1633) and began to ship radios to the British market (A. 463-464). The Pool could not assert any of these rights to prevent importation and since all basic radio patents have expired, Zenith has been able for the first time to export to and sell its radio receivers in the English market (A. 463-464). This is not true of television apparatus however (R. A. 464, 474). The Pool is armed with thousands of patents from the Pool members including the British counterparts of patents asserted by Hazeltine against Zenith in the United States (A. 145-146, 273, Def. Ex's 1, 32, A. 947, 1127-1128). Zenith has been constrained from entering the British television market by the threat of the assertion against it of pooled patents, although Zenith has successfully engineered sets for the British market and has shipped same to its English distributor with the hope that the injunctive relief sought in this suit would be granted and business on a commercial scale could be conducted (A. 464-465, 530-531).

XXIII. The manufacture in the United States of receivers for sale to exporters here or directly to importers in England (or in Canada and Australia where corresponding patent pools are operating) would risk further charges by Hazeltine of infringement of the United States patents asserted against Zenith here and Hazeltine, by virtue of its exclusive arrangements (A. 1409, Def. Ex's 43, 46, 48, A. 1167, 1176, 1183) with the English companies, is contractually unable to grant a license to manufacture in the United States for export to and sale in England under the British counterparts of its domestic patents. Hazeltine's United States package license expressly states, in compliance with the restrictions involved in the pooling arrangements (Def. Ex. 51, A. 1196-1197. Def. Ex. 52, A. 1208, 1212, 1221, Def. Ex. 58, A. 1251, 1258, 1267, Def. Ex. 118, A. 1649, Def. Ex. 180, A. 2307), that no license is granted under any patent rights of countries foreign to the United States A. 798, Def. Ex's 2, 18, A. 958-959, 1047).

XXIV. Hazeltine has always told its licensees in the United States that as a matter of policy it would never collect a second royalty on sets exported to foreign countries "where Hazeltine had complete control over its patent situation" (Def. Ex. 115, A. 1634) but that with respect to England, Canada, Australia and New Zealand, where Hazeltine patents are included in an industry-wide pool, the American licensees would have to make their own arrangements with such Pools (Def. Ex. 116, A. 1636).

The Patent Pool in Canada.

XXV. The patent pool existing in Canada is called Canadian Radio Patents Limited. This organization was formed in 1926 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Co. and by Westinghouse, through its subsidiary,

Canadian Westinghouse (Pl. Ex. 50A, A. 2829-2831; Def. Ex's 117, 125, 142, A. 1637, 1834-1836, 1964). The shareholders of Canadian Radio Patents Limited are Canadian General Electric, Canadian Westinghouse, Standard Radio Mfg. Corp. Ltd., the Canadian subsidiary of Philips of Holland, Canadian Marconi and Northern Electric (an affiliate of AT&T and Western Electric). The Pool has been largely made up of Canadian manufacturers (most of which are subsidiaries of American companies A. 90-96)) who were and are competitors of Zenith with respect to sales sought to be made in Canada (A. 457). The Pool for many years has had the exclusive right to sub-license not only the patents of the member companies but also the patents of Hazeltine (Def. Ex's 118, 119, A. 1649, 1672), RCA and a number of other foreign companies (Def. Ex's 125, 142, A. 1834, 1964, Pl. Ex. 50-A, A. 2829). Since 1943 Hazeltine has been an active participant in the activities of the Pool and has been receiving a substantial share of its profits (A. 162-163, Def. Ex's 118, 118-A-B-C, 119, A. 1645-1672). The Hazeltine patents go into the Pool pursuant to an exclusive license agreement between Hazeltine and Canadian Radio Patents Limited (Def. Ex. 118, A. 1645) which grants to the Pool the right to include Hazeltine's Canadian patents, present and future, in its licensing and litigation activities. This arrangement has been extended to a date beyond the filng of the instant counterclaim (Def. Ex. 119, A. 1672).

XXVI. The organization, purposes, and functions of the Canadian Pool are, in principle, identical to those of the English Pool. Approximately 5000 patents are amassed for licensing (Pl. Ex. 50-A, A. 2830) and the only form of license available is strictly limited to manufacture in Canada (A. 454, 706, Def. Ex's 123, Art. II, sec. 1, 150, 162-D, A. 1725, 2013, 2055). It is also a package license under all patents in the Pool and all patents issuing during

the term of the license (Def. Ex. 123, Art. II, sec. 2, A. 1725). The chief purpose of the Pool is to protect the manufacturing members and licensees from competition by American or other foreign companies seeking to export their product into Canada (A. 134, 704-705, Def. Ex's 142, 164, A. 1967, 2070-2071).

XXVII. The Pool's campaign against importation of radio and television receivers from the United States is highly organized and effective. Patent agents, investigators and agents of the conspiring companies as well as the Canadian manufacturers and distributors trade associations at the behest of the Pool have systematically policed the market in order to locate and stop the sale of imported receivers and have immediately attacked by infringement suit or threat thereof any dealer found to be selling imported receivers (Def. Ex's 129, 139-144; A. 1847-1860, 1890-1958, 1961, 1963, 1967-1968, 1970, 1973-1977). Warning notices (Def. Ex's 131-138, A. 1865-1880) addressed to importers, vendors and users of radio and television receivers advise the trade and the public that only the products of certain named local manufacturers are licensed by the Pool under "basic patents" and that even "users" of unlicensed products are subject to suit on account of patent infringement. Many advertisements run by the Pool went much further. They contained disparaging statements about imported receivers to the effect that they were cheaply made, unsatisfactory in operation, caused fires and were dangerous to use because of "shock hazard" (Def. Ex. 130, A. 1861-1864).

XXVIII. Mass attacks in the form of infringement suits were made on dealers found to be selling imported American made radio and television receivers. Suits or the threat of suits effectively prevented dealers from handling American made sets (Def. Ex's 143, 144, A. 1968-1977).

XXIX. For many years Zenith attempted to set up distribution for its products in Canada (A. 451-453) but in every instance where a Canadian distributor began to sell Zenith products he was warned by the Pool to stop and return the merchandise or face expensive infringement litigation (A. 450, Def. Ex's 155-162, A. 2022-2065). To ward off these attacks Zenith attempted to get a license from the Pool, but in every instance it was advised by the Pool manager that importation would not be permitted and, only local manufacture would be licensed (A. 410-411, 451, Def. Ex's 146-154, A. 1982-2021).

XXX. As a part of the settlement in the Zenith litigation against RCA, General Electric and Western Electric which involved the activities of the Canadian patent pool, Zenith obtained world-wide rights under the patents of the defendants (Def. Ex. 114, A. 1607, 450-454) and having obtained these and other patent licenses permitting importation into Canada, Zenith began late in 1958 to export to and sell in Canada its radio and television products through its Canadian subsidiary, Zenith Radio Corporation of Canada (A. 450, 455-456). The manager of the Pool, Brian McConnell, investigated the matter (Def. Ex's 151, 152, A. 2014-2018) and informed Zenith (A. 411-412) that in order to continue this business in Canada, Zenith would be required to sign the Pool's standard package license (Def. Ex. 124C, A. 1807) which did not permit importation (A. 410) and that Zenith would have to manufacture in Canada (A. 410) any products it intended to sell there. The Pool manager further informed Zenith that it was infringing at least one of Hazeltine's Canadian patents (A. 410, Def. Ex's 153, 154, A. 2019-2021) and that Hazeltine's patents, as well as all of the other patents in the Pool, with the exception of those owned by Westinghouse and General Electric Company, could not be licensed for importation (A. 411-412). With respect to the latter

two companies, McConnell stated that they had instructed the Pool not to refuse to license their patents for importation (A. 410). The notices to "importers, vendors or users of radio and television receivers" warning them not to purchase imported sets continued to be run by the Pool despite protests by Zenith (Def. Ex. 134, 135, 138, 143, 144, A. 1868, 1870, 1972, 1974, 570). Shortly after the aforesaid demand made on Zenith by the manager of the Canadian Pool, the instant suit was filed (A. 416).

XXXI. Hazeltine before entering into its exclusive arrangement (Def. Ex. 118, A. 1645) was fully aware of the purpose and the policy of the Pool to prevent the export of American made receivers into Canada (A. 389-390, Def. Ex. 172, A. 2133-2134) and has worked very closely with Canadian Radio Patents Limited in its licensing activities (Def. Ex's 175-178, A. 2146-2149) and its campaign against importation from the United States (Def. Ex's 174-178, A. 2143-2149).

XXXII. The proofs establish as a fact that in the circumstances of this case the Canadian Patent Act does not require the Pool to refuse to license importation, as contended by plaintiff. Nor does the Act penalize in any way a patentee who licenses for importation where, as in this case, there is being carried on extensive manufacturing in Canada under its patents (A. 705-722, 812-818, Def. Ex's 163-8, 173, A. 2066-2089, 2135-2137).

The Australian Pool.

XXXIII. The dominant electronics company in Australia and its controlled territory is and for many years has been Amalgamated Wireless (A'sia) Limited (referred to as AWA) (A. 90-93). A number of the same companies involved in the English and Canadian cartel arrangements set up a patent pool in Australia (Def. Ex. 196, A. 2476-

2482) identical in principle and purpose to the British and Canadian Pools (Def. Ex. 213, A. 2513-2519). The patents of all of the conspiring companies funnel into the Pool which is known as Australian Radio Technical Services and Patents Company Pty. Limited (commonly called ARTS). The patents flow into ARTS through AWA, Standard Telephone and Cables Pty. Ltd., N. V. Philips Gloeilampenfabrieken, Electric and Musical Industries Ltd. (owning Marconi's and other rights for Australia), Pye Ltd. and Neutrodyne Proprietary Limited (Def. Ex's 181-187, A. 2310-2380). Neutrodyne is a controlled subsidiary of Hazeltine; the latter company owns seventy percent of its stock (A. 253).

XXXIV. Under an exclusive license agreement dated September 11, 1928 (Def. Ex. 180, A. 2305), but still in full force and effect (A. 277), Neutrodyne is authorized to place all inventions and patents of Hazeltine into the Australian Pool and is required to see to it that all of the requirements, restrictions and provisions of the standard package license of Hazeline are contained in any pooling license issued thereunder (A. 2307). Sub-licensing rights, existing and future, under all of Hazeltine's inventions have been granted the Australian Pool under this arrangement for 35 years (Def. Ex's 181-87, A. 2310-2380) and have been the subject of the only form of license agreement issued by the Pool, a standard package license not referring to any particular patent or invention but to all of the rights of all the conspiring companies (Def. Ex's 188, 189, 190, 191, 192, 193, 194, 195, A. 2383, 2398, 2410, 2415, 2429, 2441, 2455, 2467). A standard Pool license imposes the restrictions necessary to effectuate the division of territories involved in the overall arrangements. It requires the licensee to agree not to export or import (Def. Ex's 188, 189, 191, 194, 195, A. 2386, 2400, 2416, 2457, 2469) or sell or offer for sale in Australia any radio or television re-

ceiving apparatus not manufactured in Australia. Hazeltine has been fully aware of the Pool's plan and policy not to license for importation and has cooperated with and approved the operation of the Pool with respect to all the Hazeltine Australian patents (Def. Ex's 197-203, 204-207, 208-212, A. 2482-2498, 2499-2503, 2504-2512).

XXXV. The standard package form of Hazeltine license covering all patents (A. 957, 1046) subject to licensing by the Pool and requiring royalty payment whether or not any such patent is used (A. 959, 1047) in the licensed apparatus, is employed by each Pool referred to in these findings. (In England A. 1290-1294, 1308-1311, 1324-1326, 1335-1338, 1346-1349, 1358-1361, 1370-1373, 1382-1384, 1393-1396; In Canada A. 1678-1681, 1693-1694, 1725-1729, 1750-1775, 1811-1816; In Australia A. 2383-2388, 2398-2402, 2415-2418, 2428-2432, 2441-2445, 2455-2459, 2467-2471) and is also used by Hazeltine in the United States in order to prevent attacks by licensees (A. 955, 1044) on any of the patents of the participating companies in any of the markets covered by these findings.

Damages Sustained by Zenith.

XXXVI. The foreign commerce of Zenith (England, Def. Ex's. 100-113, A. 1512-1594; Canada, A. 524, Def. Ex's. 156-162D, 179, A. 2025-2053, 2152-2304; Australia, Def. Ex. 215, A. 2523-2590) has been drastically curtailed by the patent Pools in England, Canada and Australia (A. 444-494, 524-531). The damages Zenith has sustained were estimated by experienced officials (A. 457, 528-9) of Zenith, thoroughly familiar with the business problems and sales potentials in the markets involved. They determined the approximate damages sustained by a thorough study of each of the markets involved (A. 528-9) and all relevant factors including tariffs, shipping costs and manufacturing problems (A. 529-30). Zenith's foreign commerce has been

damaged by the Pools in the following amounts during the 4-year statutory damage period:*

Canada		
Television	$5,826,896	
Radio	470,495	(Def. Ex. 220; A. 2661; A. 517-8)
England		
Television	4,312,924	
Radio	745,102	(Def. Ex. 220; A. 2661; A. 518)
Australia		
Television	223,508	
Radio	24,952	
Total	$11,603,877	(Def. Ex. 220; A. 2661; A. 519)

Conclusions of Law.

1. The court has jurisdiction to determine the anti-trust issues under the provisions of the Act of Congress approved July 2, 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act.

2. Plaintiff's demands on defendant coupled with the bringing of this suit and the threat to bring other suits on other patents constitute an illegal effort to coerce Defendant into signing the Hazeltine package license.

3. The policy of plaintiff, reflected in the demands made on defendant and action taken against it, was to grant no license unless under all of its hundreds of patents for a fixed royalty, is one of unlawful coercion contrary to public policy.

* The damage figures with respect to England and Australia reflect the amendment of Finding of Fact XXXVI entered by the District Court on December 13, 1965 (A. 3537).

4. The reward sought by plaintiff from defendant for inventions to be licensed in no way related to the quality of the individual patents and under the package license each patent drew strength from the others, thus unlawfully extending the monopoly of each.

5. Plaintiff's offer to license its patents individually but at royalty rates far in excess of the package rate was never an alternative to its controlling policy to grant defendant a license only under all of its patents. Rather, it was proposed by Hazeltine in the later stages of its negotiations in the instant case to cloak the harshness of the original demand by seemingly meeting the request of defendant in that regard. Although it may be said that the Hazeltine proposals on the surface were offers to treat of individual patents, the design was quite apparent—to force by unlawful coercion the acceptance of unwanted patents. This constituted an illegal extension of the patent monopolies. Whatever may be the asserted reason or attempted justification of Hazeltine, its efforts to compel defendant to accept a package of patents involved the use of one patent or group of patents as a lever to compel the acceptance of a license under others. Such a licensing scheme under applicable decisions of the Supreme Court is illegal and constitutes a misuse of the patents involved.

VI. There is a further feature of Plaintiff's licensing practices that in and of itself constitutes an illegal attempt to extend the patent monopolies. The license argeement, whether it be under a single patent or under Hazeltine's entire patent package, requires the payment of royalties in large sums for a period of five years on the entire production of the licensee whether or not any licensed patent is employed in any way in the licensee's products. Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and

plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products.

VII. The defense of misuse asserted by defendant is a valid one.

THE PATENT POOLS.

VIII. Every act in furtherance of a general plan to restrain trade and commerce, foreign or domestic, in violation of the Sherman Act, is illegal regardless of whether such act or acts when standing alone and absent conspiracy could be found to be legal.

IX. It is fundamental that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of conspirators. Acceptance of an invitation to participate in a plan, the necessary consequence of which, if carried out, is to restrain commerce, is sufficient to establish a conspiracy under the Sherman Act. Knowledge of a scheme that illegally restrains trade and participation in the plan with such knowledge is all that is required to establish a conspiracy under the anti-trust laws and prior agreements need not be shown to have been made between each and all of the conspirators in order to establish a violation of the Sherman Act.

X. The combinations represented by the patent pools in Canada, England and Australia had as their express purpose the prevention of importation into those markets of radio and television apparatus made in the United States and other countries. Hazeltine knowing of the restrictions against imports imposed by those Pools never-

theless chose to permit its patents to be used in furtherance of the scheme and thereby obtained a substantial share of the Pool's income. It thereby became a co-conspirator and legally liable for all the acts of the Pools and its members performed in furtherance of their patent licensing plan to divide markets and prevent competition from imported sets.

XI. Hazeltine's method of placing its patents in the foreign pools—the use of exclusive license agreements either directly with the Pool as in Canada or through a pool member, as in England, or through a subsidiary, as in Australia—is the traditional means employed in the formation of illegal cartels and it is no defense to say that the particular exclusive licenses to which Hazeltine was a party did not in and of themselves impose the illegal restriction. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole.

XII. Hazeltine's defense that it had no intent to restrain trade and that it participated in the Pools for business reason has no legal validity. If good business reasons and expressions of good intent would serve as a defense for restraining trade, the Sherman Act would be rendered impotent and would afford no aid to the free flow of commerce.

XIII. Hazeltine's claimed defense that conspiracies by American companies with companies abroad are governed solely by foreign law and are not violative of the Sherman Act has no legal validity. It is well established that a conspiracy to restrain the domestic or foreign commerce of the United States to which any American company is a party violates the Sherman Act irrespective of the fact that the conduct complained of occurs in whole or in part in foreign countries.

XIV. By virtue of its arrangements in connection with the Pools in Canada, England and Australia, Hazeltine has violated Section 1 of the Sherman Act.

XV. Counterclaimant has established that it has been injured in its business by virtue of the unlawful conspiracy and acts performed in furtherance thereof. As a co-conspirator Hazeltine is liable for those damages.

XVI. Counterclaimant is entitled to the injunctive relief sought in the counterclaim.

R. B. AUSTIN,
Judge, U. S. District Court.

Dated: January 25, 1965.

SCHEDULE 1

APPENDIX B.

U. S. Dollar Exports of Television Receivers and Household Type Radios to the Dominion of Canada by Calendar Year for the Years 1959 to 1967.[1]

Year	Television Receivers[2]	Radios, Household Type[3]	Total by Year
1959	$ 1,708,709	$1,374,148	$ 3,082,857
1960	2,043,088	856,597	2,899,685
1961	2,736,159	1,364,404	4,100,563
1962	2,399,370	1,313,010	3,712,380
1963	2,945,250	1,097,696	4,042,946
1964	4,501,394	1,273,836	5,775,230
1965	6,010,203	1,226,973	7,237,176
1966	14,158,687	1,097,654	15,256,341
1967	13,404,941	1,133,476	14,538,417

[1] Source: U. S. Bureau of the Census, U. S. Exports—Commodity by Country, Report FT410, Annual Edition for years 1959-1964 and December Edition for years 1965-1967.

[2] For years 1959-1964 Commodity Classification No. 70815 established in January, 1958 Edition of Schedule B, Statistical Classification of Domestic and Foreign Commodities Exported from the United States. For years 1965-1967 Commodity Classification No. 7241010 established in January, 1965 Edition of Schedule B which superseded the January, 1958 Edition.

[3] For years 1959-1964 Commodity Classification No. 70807 and for years 1965-1967 Commodity Classification No. 7242010 as per note 2 above.

SCHEDULE 2

Zenith Radio Corporation Dollar Exports of Radio and Television Receiving Sets to the Dominion of Canada, by Calendar Year, for the Years 1964-1967.[1]

Year	Dollar Amount
1964	$ 4,719,000
1965	5,998,000
1966	9,078,000
1967	12,694,000
1968 (six mos.)	6,489,000

[1] Source: Certified Copies of U. S. Department of Commerce, Bureau of the Census, Form M4-A, Export Sales and Orders by Month, filed by Zenith Radio Corporation, for years 1964, 1965, 1966, and 1967, and for first six months of 1968, appearing infra, Appendix B, pp. A-27 to A-41.

UNITED STATES OF AMERICA
DIRECTOR OF THE BUREAU OF THE CENSUS
DEPARTMENT OF COMMERCE
WASHINGTON, D. C.

I hereby certify that the annexed U. S. Department of Commerce, Bureau of the Census Form M4-A, Export Sales and Orders by Month 1964, is a true copy of the original filed by the Zenith Radio Corporation as it appears in the records and files of this Bureau subject to the limitations that have been stamped on the form; that the entry 899763 X001 on the annexed Form M4-A under the title "Identification No." designates Zenith Radio Corporation as the reporting company; that the information on the form does not include data reported on separate forms in this survey by three subsidiary companies of the Zenith Radio Corporation; and that the entry 3651 under heading "Industry Code" denotes that the reporting unit has been classified in the industry "Radio and Television Receiving Sets, Except Communication Types" in accordance with the Standard Industrial Classification Manual (1957).

The Bureau of the Census seal, authorized by Title 13, United States Code, Section 3, is impressed on each page. Judicial notice of the seal is authorized by Title 13, United States Code, Section 3.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Bureau of the Census, Department of Commerce, to be affixed this 11th day of July 1968.

DEPARTMENT OF COMMERCE * BUREAU OF THE CENSUS *

A. Ross Eckler

Director of the Bureau of the Census
Department of Commerce

DUE DATE: 15 DAYS FOLLOWING REPORT PERIOD

Form Approved: Budget Bureau No. 41-R2142

FORM 624-A
7-23-63

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXPORT SALES AND ORDERS BY MONTH – 1964

TO: Bureau of the Census, Industry Division
Washington, D.C. 20233

CONFIDENTIAL – This inquiry is authorized by Act of Congress (13 U.S.C.). The report you submit to the Census Bureau is confidential and may be seen only by sworn Census employees. It may not be used for purposes of taxation, investigation, or regulation. Copies retained in your files are also immune from legal process.

(Please correct if name or address has changed)

ZENITH RADIO CORP
6001 W. DICKENS AVE
CHICAGO 39, ILL.
ATTN: J. KUHAJEK

MIA
3939

S 99763 0000 S 99763 XXXX

THIS REPORT IS A COPY OF THE ORIGINAL REPORT WHICH HAD BEEN CONVERTED INTO A WORKING DOCUMENT FOR STATISTICAL PROCESSING. IT MAY THEREFORE CONTAIN, IN ADDITION TO THE INFORMATION SUBMITTED BY YOU, SUPPLEMENTAL OR REVISED DATA PROVIDED THROUGH CORRESPONDENCE, TELEPHONE, OR PERSONAL CONTACT AND DATA PROVIDED BY THE CENSUS BUREAU ON THE BASIS OF INDUSTRY AVERAGES OR OTHER INFORMATION, AS WELL AS INTERNAL CODING AND PROCESSING NOTATIONS. IT IS FURNISHED TO THE COMPANY FOR ITS INFORMATION.

(PLEASE RETURN THIS COPY)

INSTRUCTIONS

GENERAL

Please complete and return one (1) copy of this report not later than the date indicated above each month. This same form will be mailed back to you each month for entering the previous month's figures. For your own convenience in reporting for future months, you may wish to post each month's figures to your file copy. Please use the preaddressed return envelope in submitting your report each month.

REPORTING DATA

This report should include all sales and orders of products shipped for export by the company or division of the company designated in the address box. The definitions given below are provided as a guide for respondents. It is expected that a manufacturer will report according to his own definitions except where major differences might be expected. In such cases he would be expected to estimate rather than compile revised data from detailed records.

For purposes of this survey, it is most important that the sales figures cover the same items that are included in the orders figures. In addition to reporting sales and orders data on a comparable basis, the coverage of the figures should be consistent from month to month.

If it is not feasible to segregate nonmanufacturing receipts (licensing agreements, services, etc.) from your monthly export totals, please indicate in the Remarks section which nonmanufacturing activities are included and give their approximate percentage of the monthly total.

Report all data in thousands of dollars. Indicate the accounting period covered (i.e., month, 4-week period, 5-week period) by making "X" in the proper box in the period covered column. If your records are on a basis of 13 four-week periods, report on consecutive lines, and enter data for the 13th period after the December period.

DEFINITIONS

Exports, as understood in this survey, include (a) shipments by you or your company from the United States directly to foreign countries of products which are not subjected to further manufacture, fabrication or assembly in this country before being shipped abroad, (b) sales to the U.S. Government of products which are to be shipped abroad to a foreign nation, and (c) sales for export of your product to or on order of export firms and other sales known to you to be for export. Include shipments to foreign subsidiaries or divisions of your company and its affiliates. Do not include sales to the United States Government of products shipped abroad for use by the U.S. Armed Forces.

Shipments to customers in Canada are classified as exports. Shipments to Alaska, Hawaii, and Puerto Rico are not classified as exports.

Exports do not include products shipped to domestic customers who will further manufacture, fabricate, or assemble them. Please note, however, that the breaking down of bulk shipments of your products into smaller lots or packages is not considered to be further manufacturing, processing or assembly.

Net Export Sales – Include total company billings for exports net after discounts and allowances. Include sales to foreign subsidiaries; do not include sales by foreign subsidiaries.

Net New Export Orders Received – Include (a) the sales value of export orders received during the reporting period for products and services to be delivered at some future date, (b) the sales value of orders for immediate delivery which have resulted in export sales during the reporting period, and (c) the net sales value of contract change documents which increase or decrease the export sales value of the orders to which they are related when the parties concerned are in substantial agreement as to the amount involved. Include as export orders only those orders that are supported by binding legal documents, such as signed contracts, letters of awards, or letters of intent. In the case of letters of intent the total sales value should be included if the parties concerned are in substantial agreement on this amount; otherwise, only the funds specifically authorized to be expended should be included. Include orders received from foreign subsidiaries. Deduct the sales value of partial or complete cancellations of existing export orders.

Unfilled Export Orders, End of Month – Include export orders that have not yet passed through the sales account. Generally, unfilled export orders at the end of a reporting period are equal to unfilled export orders at the beginning of the period plus new export orders received during the period less net export sales and cancellations.

Name of person to contact regarding this report	Address (Number and street, City, State, ZIP code)	Telephone No.
J. Kuhajek	6001 W. Dickens Ave.	745-2106

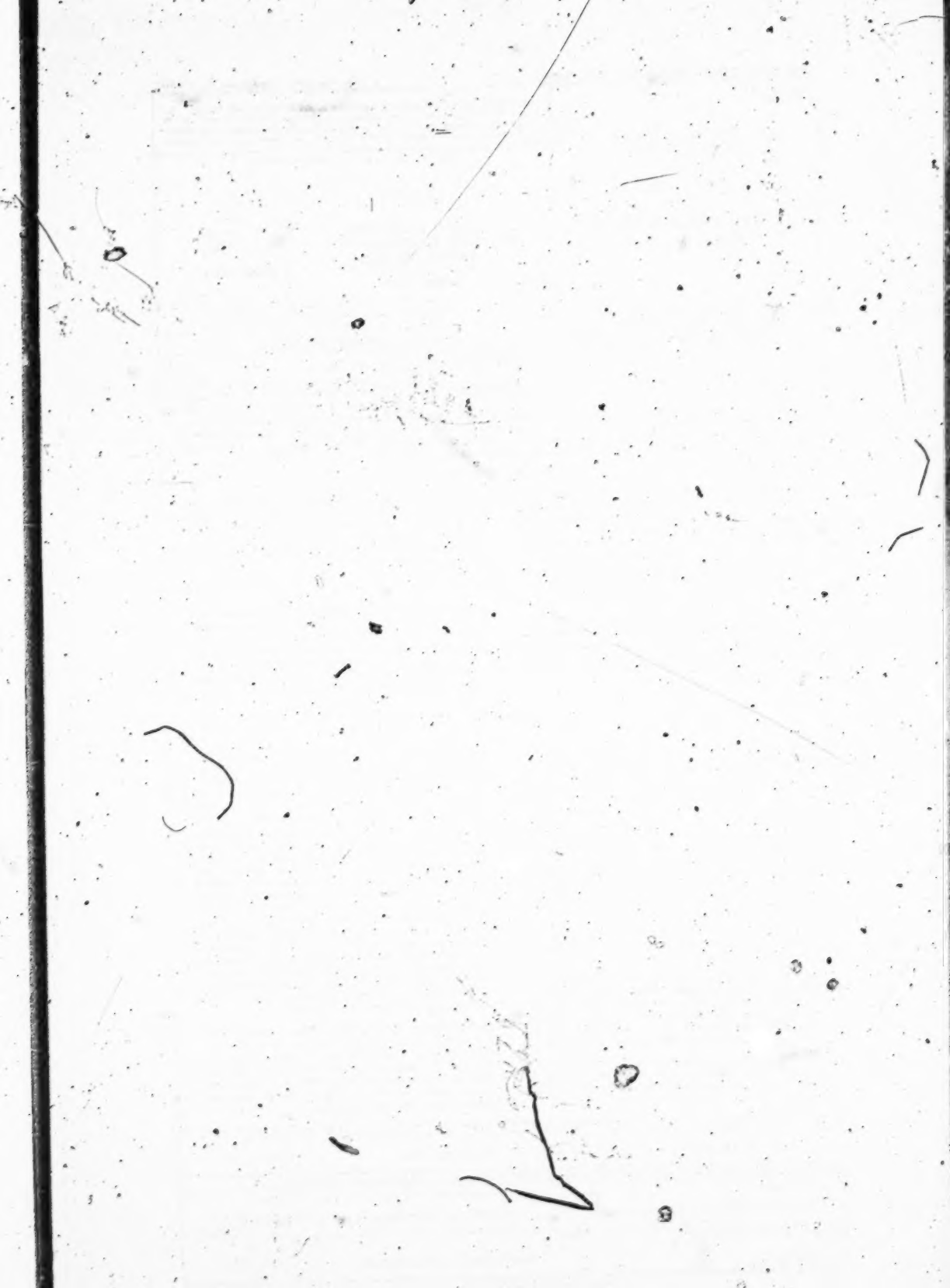
CERTIFICATION – This report is substantially accurate and has been prepared in accordance with instructions.

Name of company	Address (Number and street, City, State, ZIP code)
Zenith Radio Corporation	6001 W. Dickens Ave., Chicago, Ill. 60639

Signature of authorized official	Title	Date
[signature]	Assistant Treasurer	2-20-64

Please complete item on reverse side

USCOMM-DC 22023 P-64



CENSUS USE ONLY	Group	Survey number	Identification No.	Card type	Industry code
			89976 3X001	2	3651

EXPORT SALES AND ORDERS, BY MONTH — 1964
(Report figures in thousands of dollars)
(Be sure to include shipments to Canada in your export totals)

Please read instructions on reverse side before entering the data

MONTH	PERIOD COVERED (Mark with an "X" the box which best describes each reporting period)		NET EXPORT SALES (BILLINGS OR SHIPMENTS) (1)	NET NEW EXPORT ORDERS RECEIVED (Raw orders less cancellations) (2)	UNFILLED EXPORT ORDERS END OF MONTH (3)	VERIFICATION TOTAL (Sum of Cols. (1) − (3)) (4)	REMARKS (Describe reasons for large monthly or month changes in any of the items above; for example, acquired new firm (give name and date) vacation, strike, new accounting method, etc.
1963	X	1 CAL. MONTH					THIS REPORT IS A COPY OF THE ORIGINAL REPORT WHICH MAY HAVE CONVERTED INTO A WORKING DOCUMENT FOR STATISTICAL PROCESSING. IT MAY THEREFORE CONTAIN, IN ADDITION TO THE INFORMATION ORIGINALLY SUPPLIED AND WITHOUT BEING IDENTIFIED AS SUCH, SUPPLEMENTAL OR REVISED DATA PROVIDED THROUGH CORRESPONDENCE, TELEPHONE, OR PERSONAL INTERVIEW; OR DATA PROVIDED BY THE CENSUS BUREAU ON THE BASIS OF INDUSTRY AVERAGES OR OTHER INFORMATION, AS WELL AS INTERNAL CODING AND PROCESSING NOTATIONS. IT IS FURNISHED TO THE COMPANY FILING THE REPORT AT THAT COMPANY'S REQUEST.
DECEMBER 1964		4 WEEKS					
		5 WEEKS					
1964	X	1 CAL. MONTH					
JANUARY 1964		4 WEEKS	181	703	586	1,470	
1		5 WEEKS					
	X	1 CAL. MONTH					
FEBRUARY		4 WEEKS	434	300	452	1,186	
		5 WEEKS					
	X	1 CAL. MONTH					
FEBRUARY 1964		4 WEEKS	460	448	440	1,348	
2		5 WEEKS					
	X	1 CAL. MONTH					
MARCH		4 WEEKS	306	97	231	634	
3		5 WEEKS					
	X	1 CAL. MONTH					
APRIL		4 WEEKS	197	49	83	329	
4		5 WEEKS					
	X	1 CAL. MONTH					
MAY		4 WEEKS	156	301	228	685	
5		5 WEEKS					
	X	1 CAL. MONTH					
JUNE		4 WEEKS	112	242	358	712	
6		5 WEEKS					
	X	1 CAL. MONTH					
JULY		4 WEEKS	137	589	810	1,536	
7		5 WEEKS					
	X	1 CAL. MONTH					
AUGUST		4 WEEKS	558	748	1,000	2,306	
8		5 WEEKS					
	X	1 CAL. MONTH					
SEPTEMBER		4 WEEKS	643	1,000	1,357	3,000	
9		5 WEEKS					
	X	1 CAL. MONTH					
OCTOBER		4 WEEKS	811	458	1,004	2,273	
10		5 WEEKS					
	X	1 CAL. MONTH					
NOVEMBER		4 WEEKS	437	501	1,068	2,006	
11		5 WEEKS					
	X	1 CAL. MONTH					
DECEMBER		4 WEEKS	468	220	820	1,508	
12		5 WEEKS					
13th Reporting Period		4 WEEKS					
FOR CENSUS USE							

FORM M-A 110-ST-681

USCOMM-DC 53965-P-64

UNITED STATES OF AMERICA
DIRECTOR OF THE BUREAU OF THE CENSUS
DEPARTMENT OF COMMERCE
WASHINGTON, D. C.

I hereby certify that the annexed U. S. Department of Commerce, Bureau of the Census Form M4-A, Export Sales and Orders by Month 1965, is a true copy of the original filed by the Zenith Radio Corporation as it appears in the records and files of this Bureau subject to the limitations that have been stamped on the form; that the entry 899763 X001 on the annexed Form M4-A under the title "Identification No." designates Zenith Radio Corporation as the reporting company; that the information on the form does not include data reported on separate forms in this survey by three subsidiary companies of the Zenith Radio Corporation; and that the entry 3651 under heading "Industry Code" denotes that the reporting unit has been classified in the industry "Radio and Television Receiving Sets, Except Communication Types" in accordance with the Standard Industrial Classification Manual (1957).

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DEPARTMENT OF COMMERCE * BUREAU OF THE CENSUS *

A. Ross Eckler

Director of the Bureau of the Census
Department of Commerce

DUE DATE: 15 DAYS FOLLOWING REPORT PERIOD

Form Approved: Budget Bureau No. 41-R2142

FORM M4-A
(12-7-64)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXPORT SALES AND ORDERS BY MONTH – 1965

TO: Bureau of the Census, Industry Division
Washington, D.C. 20233

CONFIDENTIAL – This inquiry is authorized by Act of Congress (13 U.S.C.). The report you submit to the Census Bureau is confidential and may be seen only by sworn Census employees. It may not be used for purposes of taxation, investigation, or regulation. Copies retained in your files are also immune from legal process.

(Please correct if name or address has changed)

ZENITH RADIO CORP
6001 W. DICKENS AVE
CHICAGO 39, ILL.

M4A
3909

8 99999 X001

9 99999 0000

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Report all data in thousands of dollars. Indicate the accounting period covered (i.e., month, 4-week period, 5-week period) by marking "X" in the proper box in the period covered column. If your records are on a basis of 13 four-week periods, report on consecutive lines, and enter data for the 13th period after the December period.

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Net New Export Orders Received – Include (a) the sales value of export orders received during the reporting period for products and services to be delivered at some future date, (b) the sales value of orders for immediate delivery which have resulted in export sales during the reporting period, and (c) the net sales value of contract change documents which increase or decrease the export sales value of the orders to which they are related when the parties concerned are in substantial agreement as to the amount involved. Include as export orders only those orders that are supported by binding legal documents, such as signed contracts, letters of awards, or letters of intent. In the case of letters of intent the total sales value should be included if the parties concerned are in substantial agreement on this amount; otherwise, only the funds specifically authorized to be expended should be included. Include orders received from foreign subsidiaries. Deduct the sales value of partial or complete cancellations of existing export orders.

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Name of person to contact regarding this report	Address (Number and street, city, State, ZIP code)	Telephone No.
Mr. J. Kuhajek	1900 North Austin Avenue	745-2106

CERTIFICATION – This report is substantially accurate and has been prepared in accordance with instructions.

Name of company	Address (Number and street, city, State, ZIP code)
ZENITH RADIO CORPORATION	1900 North Austin Avenue Chicago, Illinois - 60639

Signature of authorized official	Title	Date
[signature]	Assistant Treasurer	2/15/65

Please complete form on reverse side

USCOMM-DC

CENSUS USE ONLY	Group	Survey number	Identification No.	Card type	Industry code
			899763 Test	2	3651

EXPORT SALES AND ORDERS, BY MONTH – 1965

(Report figures in thousands of dollars)
(Be sure to include shipments to Canada in your export totals)

Please read instructions on reverse side before entering the data

MONTH	PERIOD COVERED (Mark with an "X" the box which best describes each reporting period)		NET EXPORT SALES (BILLINGS OR SHIPMENTS) (1)	NET NEW EXPORT ORDERS RECEIVED (New orders less cancellations) (2)	UNFILLED EXPORT ORDERS END OF MONTH (3)	VERIFICATION TOTAL (Sum of Cols. (1) through (3)) (4)	REMARKS (Describe reasons for large month-to-month changes in any of the items shown, for example, acquired new line (give name and date) vacation, strike, new accounting method, etc.)
1964 DECEMBER	X	1 CAL. MONTH					THIS REPORT IS A COPY OF THE ORIGINAL REPORT WHICH HAS BEEN SUBMITTED WITH A DIFFERENT DOCUMENT FOR STATISTICAL PROCESSING. IT MAY THEREFORE CONTAIN, IN ADDITION TO THE INFORMATION ORIGINALLY SUPPLIED AND WITHOUT BEING IDENTIFIED AS SUCH, CONFIDENTIAL OR REVISED DATA PROVIDED THROUGH CORRESPONDENCE, TELEPHONE, OR PERSONAL INTERVIEW, OR DATA PROVIDED BY THE CENSUS BUREAU ON THE BASIS OF INDUSTRY AVERAGES OR ARITHMETIC ESTIMATES, AS WELL AS INTERNAL CODING AND PROCESSING NOTATIONS. IT IS FURNISHED TO THE COMPANY FROM THE REPORT AS THAT COMPANY'S RECORD.
JAN. – 1965		4 WEEKS	468	220	820	1,508	
		5 WEEKS					
1965 JANUARY	X	1 CAL. MONTH					
		4 WEEKS	371	253	702	1,326	
		5 WEEKS					
FEBRUARY	X	1 CAL. MONTH					
		4 WEEKS	456	333	579	1,368	
		5 WEEKS					
MARCH	X	1 CAL. MONTH					
		4 WEEKS	436	466	609	1,511	
		5 WEEKS					
APRIL	X	1 CAL. MONTH					
		4 WEEKS	292	(296)	21	17	
		5 WEEKS					
MAY	X	1 CAL. MONTH					
		4 WEEKS	84	180	117	381	
		5 WEEKS					
JUNE	X	1 CAL. MONTH					
		4 WEEKS	331	699	485	1,515	
		5 WEEKS					
JULY		1 CAL. MONTH					
		4 WEEKS	375	915	1025	2,315	
		5 WEEKS					
AUGUST	X	1 CAL. MONTH					
		4 WEEKS	732	1,084	1,377	3,193	
		5 WEEKS					
SEPTEMBER	X	1 CAL. MONTH					
		4 WEEKS	917	1,306	1,766	3,989	
		5 WEEKS					
OCTOBER	X	1 CAL. MONTH					
		4 WEEKS	806	262	1,222	2,290	
		5 WEEKS					
NOVEMBER	X	1 CAL. MONTH					
		4 WEEKS	598	26	650	1,274	
		5 WEEKS					
DECEMBER	X	1 CAL. MONTH					
		4 WEEKS	600	1,014	1,064	2,678	
		5 WEEKS					
13th Reporting Period		4 WEEKS					
FOR CENSUS USE							

FORM 340-A (12-7-64)

A-32

UNITED STATES OF AMERICA
DIRECTOR OF THE BUREAU OF THE CENSUS
DEPARTMENT OF COMMERCE
WASHINGTON, D. C.

I hereby certify that the annexed U. S. Department of Commerce, Bureau of the Census Form M4-A, Export Sales and Orders by Month 1966, is a true copy of the original filed by the Zenith Radio Corporation as it appears in the records and files of this Bureau subject to the limitations that have been stamped on the form; that the entry 899763 X001 on the annexed Form M4-A under the title "Identification No." designates Zenith Radio Corporation as the reporting company; that the information on the form does not include data reported on separate forms in this survey by three subsidiary companies of the Zenith Radio Corporation; and that the entry 3651 under heading "Industry Code" denotes that the reporting unit has been classified in the industry "Radio and Television Receiving Sets, Except Communication Types" in accordance with the Standard Industrial Classification Manual (1957).

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A. Ross Eckler

Director of the Bureau of the Census
Department of Commerce

DUE DATE: 15 DAYS FOLLOWING REPORT PERIOD

Form Approved: Budget Bureau No. 41-R212

FORM M4-A (11-65)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXPORT SALES AND ORDERS BY MONTH – 1966

TO: Bureau of the Census, Industry Division
Washington, D.C. 20233

NOTICE – Your report to the Census Bureau is confidential by law (Title 13 U.S. Code), it may be seen only by sworn Census employees and may be used only for statistical purposes. The law also provides that copies retained in your files are immune from legal process.

(Please correct if name or address has changed)

ZENITH RADIO CORP
6001 W. DICKENS AVE.
CHICAGO 39, ILL. 60639

M4A
3651
S 99763 X001

? 99763 0000

THIS REPORT IS A COPY OF THE ORIGINAL REPORT WHICH WAS CONVERTED INTO A WORKING DOCUMENT FOR REFERENCE, PROCESSING. IT MAY THEREFORE CONTAIN, IN ADDITION TO THE INFORMATION CONTRIBUTED, OUTLINES AND NOTATIONS BEING IDENTIFIED AS [illegible]

INSTRUCTIONS

GENERAL – [illegible] CORRESPONDENCE, TELEPHONE, OR PERSONAL INTERVIEW, OR DATA PROVIDED BY THE CENSUS BUREAU ON THE BASIS OF INDUSTRY ANSWERS OR OTHER INFORMATION, AS WELL AS INTERNAL CODING AND PROCESSING NOTATIONS. IT IS FURNISHED TO THE COMPANY [illegible] THE PURPOSE OF THIS SURVEY IS STATED.

Please complete and return one (1) copy of this report not later than [illegible] following the month reported. This same form will be mailed back to you each month for entering the previous month's figures. For your own convenience in reporting for future months, you may wish to post each month's figures to your file copy. Please use the preaddressed return envelope in submitting your report each month.

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Report all data in thousands of dollars. Indicate the accounting period covered (i.e., month, 4-week period, 5-week period) by marking "X" in the proper box. If your records are on a basis of 13 four-week periods, enter data for the 13th period in the column provided for this purpose.

DEFINITIONS

Exports, as understood in this survey, include (a) shipments by you or your company from the United States directly to foreign countries of products which are not subjected to further manufacture, fabrication or assembly in this country before being shipped abroad, (b) sales to the U.S. Government of products which are to be shipped abroad to a foreign nation, and (c) sales for export of your product to or on order of export firms and other sales known to you to be for export. Include shipments to foreign subsidiaries or divisions of your company and its affiliates. Do not include sales to the United States Government of products shipped abroad for use by the U.S. Armed Forces.

Shipments to customers in Canada are classified as exports. Shipments to Alaska, Hawaii, and Puerto Rico are not classified as exports.

Exports do not include products shipped to domestic customers who will further manufacture, fabricate, or assemble them. Please note, however, that the breaking down of bulk shipments of your products into smaller lots or packages is not considered to be further manufacturing, processing or assembly.

Net Export Sales – Include total company billings for exports net after discounts and allowances. Include sales to foreign subsidiaries; do not include sales by foreign subsidiaries.

Net New Export Orders Received – Include (a) the sales value of export orders received during the reporting period for products and services to be delivered at some future date, (b) the sales value of orders for immediate delivery which have resulted in export sales during the reporting period, and (c) the net sales value of contract change documents which increase or decrease the export sales value of the orders to which they are related when the parties concerned are in substantial agreement as to the amount involved. Include as export orders only those orders that are supported by binding legal documents, such as signed contracts, letters of awards, or letters of intent. In the case of letters of intent the total sales value should be included if the parties concerned are in substantial agreement on this amount; otherwise, only the funds specifically authorized to be expended should be included. Include orders received from foreign subsidiaries. Deduct the sales value of partial or complete cancellations of existing export orders.

Unfilled Export Orders, End of Month – Include export orders that have not yet passed through the sales account. Generally, unfilled export orders at the end of a reporting period are equal to unfilled export orders at the beginning of the period plus new export orders received during the period less net export sales and cancellations.

Name of person to contact regarding this report	Address (Number and street, city, State, ZIP code)	Telephone (Area code, number, extension)
Mr. J. Kuhajek	1900 N. Austin Avenue	312-745-2106

CERTIFICATION – This report is substantially accurate and has been prepared in accordance with instructions.

Name of company	Address (Number and street, city, State, ZIP code)	
Zenith Radio Corporation	1900 N. Austin Avenue	
Signature of authorized official	**Title**	**Date**
[signature]	Assistant Treasurer	2-17-66

Please complete form on reverse side

USCOMM-DC

Please read instructions on reverse side before entering the data

EXPORT SALES AND ORDERS, BY MONTH – 1966

(Report figures in thousands of dollars)
(Be sure to include shipments to Canada in your export sales)

CENSUS USE ONLY

Group	Survey	Identification No.	Sampling Entity	Industry Code
1	1900	8 9 9 7 6 3 X C 0 1		3631

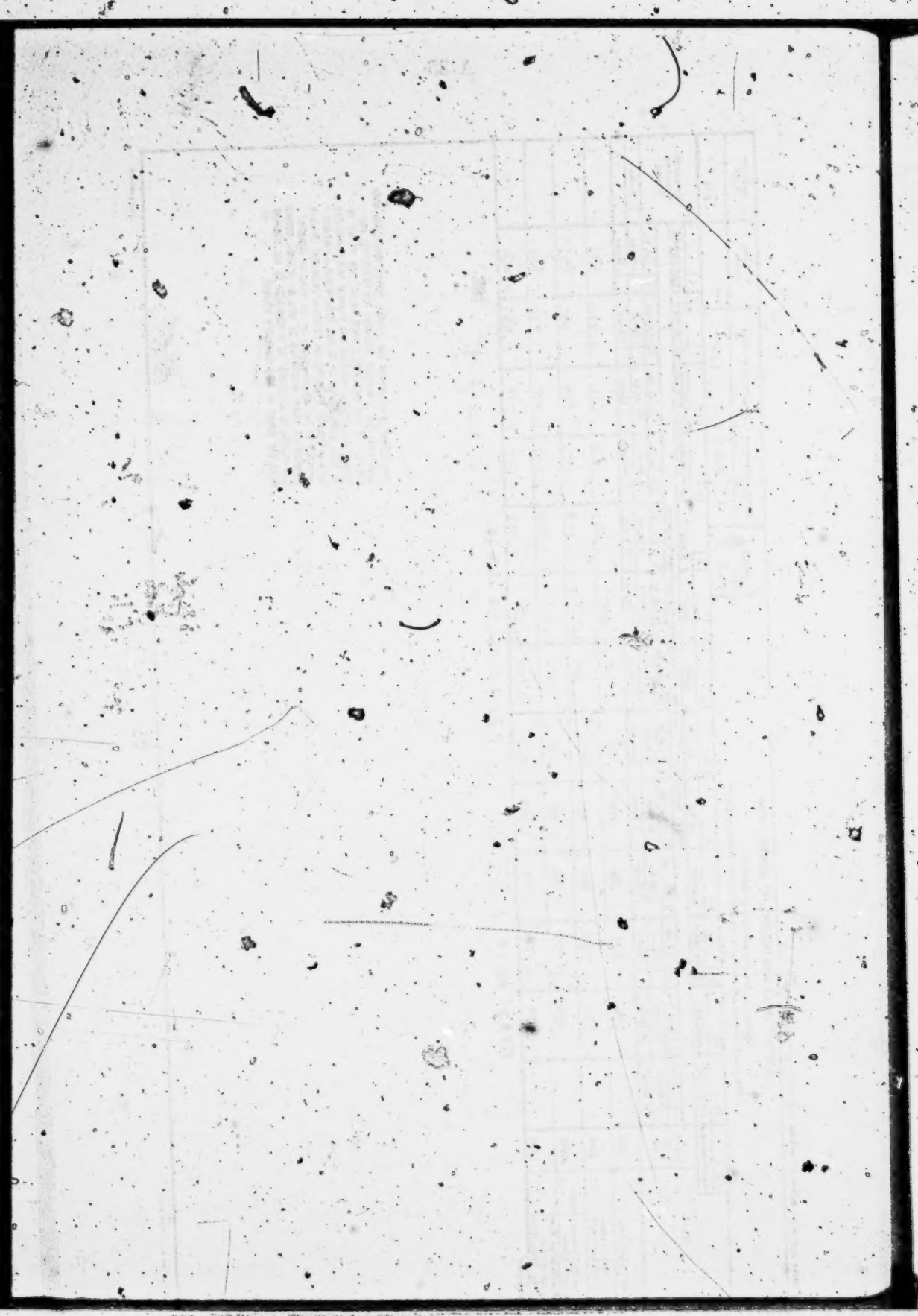
Item	Survey item code	C.T. 1 / Month	DEC. 1965	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	Thirteenth Reporting Period
				1	2	3	4	5	6	7	8	9	0	X	Y	
		NOTE: Mark with an "X" each box which best describes each reporting period														
		1 Col. Mo. / 4 Weeks / 5 Weeks	X	X	X	X	X	X	X	X	X	X	X	X	X	4 Weeks
Net Export Sales	1000		396	621	686	622	438	663	866	1,063	1,389	610	1,248	880		
Net New Export Orders Received	2000		520	592	893	417	979	525	1,115	1,159	971	716	581	861		
Unfilled Export Orders, end of month	3000		1,188	1,159	766	561	1,102	964	1,613	1,709	1,291	1,397	734	715		
Verification Total (Sum of codes 1000, 2000, 3000)	4000		2,104	2,372	1,745	1,600	2,519	2,152	3,194	3,931	3,651	2,723	2,559	2,456		

Remarks

FEB 23 MAR 28 1966 AUG 18 SEP 16 DEC

THIS REPORT IS A COPY OF THE ORIGINAL REPORT WHICH HAS BEEN CONVERTED INTO A WORKING DOCUMENT FOR STATISTICAL PROCESSING. IT MAY THEREFORE CONTAIN, IN ADDITION TO THE INFORMATION ORIGINALLY SUPPLIED AND WITHOUT BEING IDENTIFIED AS SUCH, SUPPLEMENTAL OR REVISED DATA PROVIDED THROUGH CORRESPONDENCE, TELEPHONE, OR PERSONAL INTERVIEW, OR DATA PROVIDED BY THE CENSUS BUREAU OR THE BASIS OF INDUSTRY AVERAGES OR OTHER INFORMATION, AS WELL AS INTERNAL CODING AND PROCESSING NOTATIONS. IT IS FURNISHED TO THE COMPANY FILING THE REPORT AT THAT COMPANY'S REQUEST.

A-35



UNITED STATES OF AMERICA
DIRECTOR OF THE BUREAU OF THE CENSUS
DEPARTMENT OF COMMERCE
WASHINGTON, D. C.

I hereby certify that the annexed U. S. Department of Commerce, Bureau of the Census Form M4-A, Export Sales and Orders by Month 1967, is a true copy of the original filed by the Zenith Radio Corporation as it appears in the records and files of this Bureau subject to the limitations that have been stamped on the form; that the entry 899763 7209 on the annexed Form M4-A under the title "Identification No." designates Zenith Radio Corporation as the reporting company; that the information on the form does not include data reported on separate forms in this survey by three subsidiary companies of the Zenith Radio Corporation; and that the entry 3651 under heading "Industry Code" denotes that the reporting unit has been classified in the industry "Radio and Television Receiving Sets, Except Communication Types" in accordance with the Standard Industrial Classification Manual (1957).

The Bureau of the Census seal, authorized by Title 13, United States Code, Section 3, is impressed on each page. Judicial notice of the seal is authorized by Title 13, United States Code, Section 3.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Bureau of the Census, Department of Commerce, to be affixed this 11th day of July 1968.

DEPARTMENT OF COMMERCE * BUREAU OF THE CENSUS *

A. Ross Eckler

Director of the Bureau of the Census
Department of Commerce

DUE DATE: 15 DAYS FOLLOWING REPORT PERIOD

Form Approved: Budget Bureau No. 41-R2142

FORM M4-A
(11-22-66)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXPORT SALES AND ORDERS BY MONTH – 1967

TO: Bureau of the Census, Industry Division
Washington, D.C. 20233

NOTICE – Your report to the Census Bureau is confidential by law (Title 13 U.S. Code). It may be seen only by sworn Census employees and may be used only for statistical purposes. The law also provides that copies retained in your files are immune from legal process.

(Please correct if name or address has changed)

499763 7209 7 10 M&A
3651 4000
ZENITH RADIO CORP
ATTN MR. J. KUHAJEK M357 7A E43
1900 NORTH AUST.N AVENUE
CHICAGO ILL 60639

(PLEASE DETACH BEFORE RETURNING REPORT)

INSTRUCTIONS

GENERAL

Please complete and return one (1) copy of this report not later than [illegible] ported. This same form will be mailed back to you each month for entering the previous month's figures. For your own convenience in reporting for future months, you may wish to post each month's figures to your file copy. Please use the preaddressed return envelope in submitting your report each month.

REPORTING OF DATA

This report should include all sales and orders of products shipped for export by the company or division of the company designated in the address box. The definitions given below are provided as a guide for respondents. It is expected that a manufacturer will report according to his own definitions except where major differences might be expected. In such cases he would be expected to estimate rather than compile revised data from detailed records.

For purposes of this survey, it is most important that the sales figures cover the same items that are included in the orders figures. In addition to reporting sales and orders data on a comparable basis, the coverage of the figures should be consistent from month to month.

If it is not feasible to segregate nonmanufacturing receipts (licensing agreements, services, etc.) from your monthly export totals, please indicate in the Remarks section which nonmanufacturing activities are included and give their approximate percentage of the monthly total.

Report all data in thousands of dollars. Indicate the accounting period covered (i.e., month, 4-week period, 5-week period) by marking "X" in the proper box. If your records are on a basis of 13 four-week periods, report data for the 13th period in the column provided for this purpose.

DEFINITIONS

Exports, as understood in this survey, include [illegible] shipments by you or your company from the United States directly to foreign countries of products which are not subjected to further manufacture, fabrication or assembly in this country before being shipped abroad, (b) sales to the U.S. Government of products which are to be shipped abroad to a foreign nation, and (c) sales for export of your product to or on order of export firms and other sales known to you to be for export. Include shipments to foreign subsidiaries or divisions of your company and its affiliates. Do not include sales to the United States Government of products shipped abroad for use by the U.S. Armed Forces.

Shipments to customers in Canada are classified as exports. Shipments to Alaska, Hawaii, and Puerto Rico are not classified as exports.

Exports do not include products shipped to domestic customers who will further manufacture, fabricate, or assemble them. Please note, however, that the breaking down of bulk shipments of your products into smaller lots or packages is not considered to be further manufacturing, processing or assembly.

Net Export Sales – Include total company billings for exports net other discounts and allowances. Include sales to foreign subsidiaries; do not include sales by foreign subsidiaries.

Net New Export Orders Received – Include (a) the gross value of export orders received during the reporting period for products and services to be delivered at some future date, (b) the sales value of orders for immediate delivery which have resulted in export sales during the reporting period, and (c) the net sales value of contract change documents which increase or decrease the export sales value of the orders to which they are related when the parties concerned are in substantial agreement as to the amount involved. Include as export orders only those orders that are supported by binding legal documents, such as signed contracts, letters of awards, or letters of intent. In the case of letters of intent the total sales value should be included if the parties concerned are in substantial agreement on this amount; otherwise, only the funds specifically authorized to be expended should be included. Include orders received from foreign subsidiaries. Deduct the sales value of partial or complete cancellations of existing export orders.

Unfilled Export Orders, End of Month – Include export orders that have not yet passed through the sales account. Generally, unfilled export orders at the end of a reporting period are equal to unfilled export orders at the beginning of the period plus new export orders received during the period less net export sales and cancellations.

Name of person to contact regarding this report	Address (Number and street, city, State, ZIP code)	Telephone (Area code, number, extension)
Mr. J. Kuhajek	1900 North Austin Avenue Chicago, Illinois 60639	312-745-2106

CERTIFICATION – This report is substantially accurate and has been prepared in accordance with instructions.

Name of company	Address (Number and street, city, State, ZIP code)	
Zenith Radio Corporation	1900 North Austin Avenue Chicago, Illinois 60639	
Signature of authorized official	Title	Date
[signature]	Assistant Treasurer	March 10, 1967

Please complete form on reverse side

Please read instructions on reverse side before entering the data

EXPORT SALES AND ORDERS, BY MONTH – 1967

(Report figures in thousands of dollars)
(Be sure to include shipments to Canada in your export totals)

CENSUS USE ONLY	Group	Survey	Identification No.	Sampling factor	Industry Code
	1	1900	897763709		3651

Item	C.T. 1 Survey item code	Month → DEC. 1966	1 JANUARY	2 FEBRUARY	3 MARCH	4 APRIL	5	6 JUNE	7 JULY	8 AUGUST	9 SEPTEMBER	0 OCTOBER	X NOVEMBER	Y DECEMBER	13th Reporting Period
		NOTE: Mark with an X each box which best describes each reporting period													
		X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	X 1 Col. No. 4 Weeks 5 Weeks	4 Weeks
Net Export Sales	1000	880	799	769	1,091	894	690	819	678	1,270	1,121	1,370	1,372	1,821	
Net New Export Orders Received	2000	861	1,675	834	649	555	426	1,139	1,313	724	1,470	1,840	1,112	2,589	
Unfilled Export Orders, end of month	3000	715	1,591	1,656	1,214	875	611	931	1,566	1,020	1,370	1,840	1,580	2,140	
Verification Total (Sum of codes 1000, 2000, 3000)	6000	2,456	4,065	3,259	2,954	2,324	1,727	2,889	3,557	3,014	3,961	5,050	4,064	6,550	

CENSUS USE ONLY → APR 20 MAY 18 JUN 16 JUL 19 AUG 17 SEP 19 OCT 16 NOV 20 DEC 18 FEB 16

Remarks CO

JANUARY

FEBRUARY

MARCH

APRIL

MAY

JUNE

JULY

AUGUST

SEPTEMBER

OCTOBER

NOVEMBER

DECEMBER

RECEIVED 1968 JUN 9 AM 8 BUREAU OF THE CENSUS CORP.

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FORM M3-A (1-12-66)

Page 2

USCOMM-DC

A-38

UNITED STATES OF AMERICA
DIRECTOR OF THE BUREAU OF THE CENSUS
DEPARTMENT OF COMMERCE
WASHINGTON, D. C.

I hereby certify that the annexed U. S. Department of Commerce, Bureau of the Census Form M4-A, Export Sales and Orders by Month 1968, is a true copy of the original filed by the Zenith Radio Corporation as it appears in the records and files of this Bureau subject to the limitations that have been stamped on the form; that the entry 899763 7209 on the annexed Form M4-A under the title "Identification No." designates Zenith Radio Corporation as the reporting company; that the information on the form does not include data reported on separate forms in this survey by three subsidiary companies of the Zenith Radio Corporation; and that the entry 3651 under heading "Industry Code" denotes that the reporting unit has been classified in the industry "Radio and Television Receiving Sets, Except Communication Types" in accordance with the Standard Industrial Classification Manual (1957).

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DEPARTMENT OF COMMERCE * BUREAU OF THE CENSUS *

A. Ross Eckler

Director of the Bureau of the Census
Department of Commerce

DUE DATE: 15 DAYS FOLLOWING REPORT PERIOD

Form Approved: Budget Bureau No. 41-R2142

FORM M4-A
(11-27-67)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXPORT SALES AND ORDERS BY MONTH – 1968

1105

TO: Bureau of the Census, Industry Division
Washington, D.C. 20233

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(Please correct if name or address has changed)

899783 7209 7 10 , M4A
10 3651 4000
ZENITH RADIO CORP
ATT MR J KUHAJEK ASST TREAS
~~4001 W DIVISION AVE~~ 1900 N AUSTIN AVE
CHICAGO ILL 60639

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INSTRUCTIONS

GENERAL

Please complete and return one (1) copy of this report not later than the 15th of the month following the month reported. This same form will be mailed back to you each month for entering the previous month's figures. For your own convenience in reporting for future months, you may wish to post each month's figures to your file copy. Please use the preaddressed return envelope in submitting your report each month.

REPORTING OF DATA

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DEFINITIONS

Exports, as understood in this survey, include (a) shipments by you or your company from the United States directly to foreign countries of products which are not subjected to further manufacture, fabrication or assembly in this country before being shipped abroad, (b) sales to the U.S. Government of products which are to be shipped abroad to a foreign station, and (c) sales for export of your product to or on order of export firms and other sales known to you to be for export. Include shipments to foreign subsidiaries or divisions of your company and its affiliates. Do not include sales to the United States Government of products shipped abroad for use by the U.S. Armed Forces.

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Net New Export Orders Received – Include (a) the sales value of export orders received during the reporting period for products and services to be delivered at some future date, (b) the sales value of orders for immediate delivery which have resulted in export sales during the reporting period, and (c) the net sales value of contract change documents which increase or decrease the export sales value of the orders to which they are related when the parties concerned are in substantial agreement as to the amount involved. Include as export orders only those orders that are supported by binding legal documents, such as signed contracts, letters of awards, or letters of intent. In the case of letters of intent the total sales value should be included if the parties concerned are in substantial agreement on this amount; otherwise, only the funds specifically authorized to be expended should be included. Include orders received from foreign subsidiaries. Deduct the sales value of partial or complete cancellations of existing export orders.

Unfilled Export Orders, End of Month – Include export orders that have not yet passed through the sales account. Generally, unfilled export orders at the end of a reporting period are equal to unfilled export orders at the beginning of the period plus new export orders received during the period less net export sales and cancellations.

Name of person to contact regarding this report	Address (Number and street, city, State, ZIP code)	Telephone (Area code, number, extension)
J. Kuhajek	1900 N. Austin Avenue	745-2106

CERTIFICATION – This report is substantially accurate and has been prepared in accordance with instructions.

Name of company	Address (Number and street, city, State, ZIP code)
Zenith Radio Corporation	1900 N. Austin Avenue, Chicago, Ill. 60639

Signature of authorized official	Title	Date
[signature]	Asst. Treasurer	3/4/68

Please complete form on reverse side.

Please read instructions on reverse side before entering the data

EXPORT SALES AND ORDERS, BY MONTH – 1968 CANADA ONLY

(Report figures in thousands of dollars)
(Be sure to include shipments to Canada in your export totals.)

CENSUS USE ONLY

Group	Survey	Identification No.	Sampling factor	Industry Code
1	1900	894763120		3651

Item	Survey item code	C.T. 1 Month → DEC. 1967	1 JANUARY	2 FEBRUARY	3 MARCH	4 APRIL	5 MAY	6 JUNE	7 JULY	8 AUGUST	9 SEPTEMBER	O OCTOBER	X NOVEMBER	V DECEMBER	13th Reporting Period
		NOTE: Mark with an "X" each box which best describes each reporting period.													
		X 1 Col. Mo. 4 Weeks 5 Weeks	X 1 Col. Mo. 4 Weeks 5 Weeks	X 1 Col. Mo. 4 Weeks 5 Weeks	X 1 Col. Mo. 4 Weeks 5 Weeks	X 1 Col. Mo. 4 Weeks 5 Weeks	X 1 Col. Mo. 4 Weeks 5 Weeks	X 1 Col. Mo. 4 Weeks 5 Weeks	1 Col. Mo. 4 Weeks 5 Weeks	1 Col. Mo. 4 Weeks 5 Weeks	1 Col. Mo. 4 Weeks 5 Weeks	1 Col. Mo. 4 Weeks 5 Weeks	1 Col. Mo. 4 Weeks 5 Weeks	1 Col. Mo. 4 Weeks 5 Weeks	4 Weeks
Net Export Sales	1000	1,891	1,296	1,148	1,269	1,377	793	806							
Net New Export Orders Received	2000	2,589	365	1,564	987	788	398	2,607							
Unfilled Export Orders, end of month	3000	2,340	1,809	1,685	1,373	884	489	2,290							
Verification Total (Sum of codes 1000, 2000, 3000)	6000	6,820	3,470	4,397	3,629	3,049	1,680	5,703							

CENSUS USE ONLY → FEB 22 months / APR 21 MAY 21 JUL 18

Remarks

JANUARY

FEBRUARY

MARCH

APRIL

MAY

JUNE

JULY

AUGUST

SEPTEMBER

OCTOBER

NOVEMBER

DECEMBER

THIS REPORT IS A COPY OF THE ORIGINAL REPORT WHICH HAD BEEN CONVERTED INTO A MACHINE DOCUMENT FOR STATISTICAL PROCESSING. IT MAY THEREFORE CONTAIN, IN ADDITION TO THE INFORMATION ORIGINALLY SUPPLIED AND WITHOUT BEING IDENTIFIED AS SUCH, SUPPLEMENTAL OR REVISED DATA PROVIDED THROUGH CORRESPONDENCE, TELEPHONE, OR PERSONAL INTERVIEW OR DATA PROVIDED BY THE CENSUS BUREAU ON THE BASIS OF INDUSTRY AVERAGES OR OTHER INFORMATION, AS WELL AS INTERNAL CODING AND PROCESSING NOTATIONS. IT IS FURNISHED TO THE COMPANY FILING THE REPORT AT THAT COMPANY'S REQUEST.

FORM M-A (11-67-67)

USCOMM-DC